A

# SUMMARY

OF THE

# Conſtitutional Laws

## Of England,

BEING

## AN ABRIDGEMENT

OF

## *BLACKSTONE'S COMMENTARIES.*

By the Rev. Dr. JOHN TRUSLER.

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# ADVERTISEMENT.

EVERY thing in Blackſtone, neceſſary for the general reader, is here compriſed and fully explained, and nothing omitted but what is peculiarly adapted to the profeſſion of a Lawyer; and it wanted only ſuch an abridgement, as is here made, to make Blackſtone's Commentaries uſeful to all claſſes of people.

AN

# ABRIDGMENT

OF

# Blackſtone's Commentaries,

## BOOK I.

*Introduction, and on the Rights of the People.*

### Chap. Firſt.

### ON THE COMMON AND STATUTE LAW.

THAT a knowledge of the laws of that ſociety in which we live, is a proper accompliſhment for a gentleman, is too evident to be denied, every man being intereſted, in the laws of the kingdom where he reſides, particularly gentlemen who have property as well as character to loſe; and ignorance of thoſe laws is never admitted as a legal excuſe for the breach of them. I ſhall endeavour, therefore, to make the general reader acquainted with ſuch as more immediately concern him, omitting thoſe only which it is the province of a lawyer to underſtand.

Now theſe laws may be divided into two kinds, *Common* Law, and *Statute* Law. *Common* Law includes not only *general Cuſtoms*, but alſo thoſe *particular* ones obſerved only in certain juriſdictions. The *Statute* Law conſiſts of the various acts of parliament made from time to time.

Common Law then, may be conſidered as of three kinds, 1. General Cuſtoms; 2. Particular ones; and 3. Certain peculiar Laws, obſerved only in certain juriſdictions.

I. By general cuſtoms it is, that proceedings are guided in the common courts of juſtice, both with reſpect to property and offences. It is by cuſtom in common law, that the eldeſt ſon inherits from his father; that property may be purchaſed by writings; that a deed is void, if not ſealed and delivered; that money, lent upon a bond, is recoverable by action of debt; and, that a breach of the peace is puniſhable by fine and impriſonment. Theſe are doctrines not eſtabliſhed by any act of parliament or any written law, but depend on immemorial uſage.

The validity of theſe doctrines is determinable by the judges, whoſe knowledge in the matter ariſes from ſtudy and experience; and it is an invariable rule, where a deciſion has once been made on any point, to determine it in the ſame way again, unleſs the precedent can be proved erroneous; judges being ſworn to determine, not according to their own private opinion, but the known laws and cuſtoms of the land.

II. The ſecond branch of the common law are particular cuſtoms, ſuch as affect only particular diſtricts; as the cuſtoms of counties, cities, manors, and the like. But ſuch cuſtoms muſt be proved to have exiſted time immemorial, to have continued without any legal interruption, and muſt at the ſame time be reaſonable, certain, compulſory and conſiſtent.

With reſpect to *uninterrupted continuance*; if the inhabitants of a village have a right to paſs through certain fields to church, the right is not loſt, even though it ſhould have been diſcontinued for ten years; but if the right be legally interrupted or diſcontinued for one day, the cuſtom is deſtroyed.

So a cuſtom muſt be *reaſonable*. That no man ſhall turn his cattle upon a common, till the Lord of the manor has firſt turned *his* on, cannot hold good, becauſe the Lord may never turn his on; in which caſe the tenants would loſe their benefit.

So it muſt alſo be *certain*, that is fixed: for example, to pay one ſhilling in lieu of tithes is good, but to pay ſometimes one ſhilling, and ſometimes two, is bad, becauſe uncertain. It muſt likewiſe be *compulſory*, that is, not left to the opinion of every man; and it muſt, further, be *conſiſtent*, that is, one cuſtom muſt not claſh with another. If I have a right to a window looking into another's garden; the other can have no right to obſtruct it.

III. The third branch are thoſe peculiar laws, uſed only in certain courts and juriſdictions, as the Civil and Canon Law.

By the *Civil* Law is meant the law of the civil courts: by the *Canon* Law, that of the eccleſiaſtical courts.

Statutes or acts of parliament, are either *public* or *private*. A public act affects the whole community; private acts operate only on particular perſons.

The common and ſtatute law then is the ground-work of the laws of this country; though the court of equity is ſometimes applied to moderate and explain them. Now theſe laws extend throughout England, Wales and the Iſle of Wight: The Iſle of Man has laws of it's own; ſo have the iſlands of Jerſey, Guernſey, Sark and Alderney, but an appeal lies from them to the Privy Council. The main ſea, however, is conſidered as part of the realm of England.

## Chap. Second.

## ON THE DIVISION OF ENGLAND.

ENGLAND may be conſidered as in two diviſions, *Eccleſiaſtical* and *Civil*.

I. The eccleſiaſtical conſiſts of two provinces, Canterbury and York. The See of Canterbury has juriſdiction over twenty-one ſuffragan dioceſes; the remaining three, viz. Carliſle, Cheſter and Durham, with the biſhopric of Man, are ſubject to York.

Each dioceſe or biſhopric is divided into archdeaconries, of which there are ſixty; and every archdeaconry is divided into pariſhes.

The boundaries of pariſhes of which there are about ten thouſand, were originally marked agreeable to the manor or manors in which they ſtood. Lords of manors built churches on their waſte grounds for the accommodation of their tenants, and obliged thoſe tenants to appropriate their tithes to the ſupport of one officiating miniſter (nominated by them, but approved of by the biſhop) which before were diſtributed at large among the clergy of the dioceſe, and this diſtrict or tract of land, where the tithes were ſo appropriated, became a pariſh. If a Lord had a parcel of land lying remote from the body of his eſtate, not ſufficient to form a pariſh of itſelf, he endowed his church with the tithes of thoſe out-lying lands, and hence it is that pariſhes are frequently intermixed with each other. Such lands as are now extra-parochial, were either ſituated in deſart places, or being in the poſſeſſion of careleſs or irreligious owners, were wholly unattended to.

II. The *Civil* diviſion of the kingdom is into counties; of counties into hundreds, and of hundreds into tithings or towns; ſo called becauſe *ten* freeholders with their families compoſed a tithing, and ten tithings were called a hundred, becauſe it conſiſted of ten times ten families. One of the chief inhabitants annually appointed to preſide over the reſt, was called a *tithing-man*.

A city is a town incorporated, which is, or hath been, the ſee of a biſhop, as that of Weſtminſter. A borough is a town that ſends members to parliament, whether it be incorporated or not.

Each hundred is governed by a high conſtable or bailiff. In the northern counties, hundreds are called *wapentakes*. An indefinite number of hundreds form a county or ſhire; though in ſome counties, there is an intermediate diviſion between ſhires and hundreds, as *lathes* in Kent, and *rapes* in Suſſex, each containing three or four hundreds. In England there are forty counties; in Wales, twelve.

Three of theſe counties are called counties palatine, viz. Cheſter, Durham and Lancaſter, from *a palatio*, becauſe the owners, the Earl of Cheſter, Biſhop of Durham and Duke of Lancaſter had royal rights there, as extenſive as the King had in his palace, ſuch as a power to pardon and appoint judges. Of theſe three, the only one remaining in the hands of a ſubject is Durham; Cheſter and Lancaſter being united to the crown.

The Iſle of Ely is indeed a royal franchiſe, the biſhop having, by a grant from Hen. I. regal rights within the iſland; of courſe, juriſdiction over all cauſes, criminal and civil.

There are alſo certain cities and towns, that are counties of themſelves, with more or leſs territories annexed, not comprized in any other county; but are governed, by favour of different kings, by their own ſheriffs and magiſtrates, as London, York, Briſtol, Norwich, and ſome others.

## Chap. Third.

### OF THE RIGHTS OF PERSONS.

THE principal objects of the Civil Law of this country are *rights* and *wrongs*: Rights are thoſe of *perſons* and *things*. We will ſpeak firſt of the rights of perſons.

The rights of perſons are of two kinds, abſolute and relative; ſuch as belong to individuals, and ſuch as appertain to men as members of ſociety.

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The abſolute rights of men are three, *perſonal ſecurity*; *perſonal liberty*, and *private property*.

Perſonal ſecurity conſiſts in the uninterrupted enjoyment of life, health and character; and whoever ſhall take away or injure either, is liable to puniſhment.

Perſonal liberty is held ſo valuable, that it can never be abridged, but by permiſſion of the laws. Forcibly detaining a man in the ſtreet is conſidered as impriſoning him; and the natural conſequence of this perſonal liberty is, that no Engliſhman, can be driven from his country, unleſs by ſentence of the law; and with reſpect to his property, the law will not authoriſe the violation of it, even for the general good. The legiſlature does occaſionally oblige owners of land to ſell it, for the benefit of making public roads and canals; but theſe exertions of power are uſed with great caution, and the perſon ſo obliged to ſell, is paid the full value of it. A man is not even obliged to pay a tax, but ſuch as is impoſed by his own conſent or that of his repreſentatives in parliament.

To protect theſe rights the conſtitution of this country has eſtabliſhed, 1. A parliament. 2. The King's prerogative. 3. Courts of juſtice. 4. The right of petitioning the King or parliament, and 5. That of having arms for our defence under certain reſtrictions.

## Chap. Fourth.

## OF THE PARLIAMENT.

WE will now ſpeak of the parliament, and under this head ſhall conſider the relative rights of men as members of Society.

In all deſpotic goverments, the ſupreme magiſtracy or power of making and enforcing laws, is veſted in one man or one body of men; and where theſe two are united, there can be no public liberty; but where the legiſlative and executive authorities are in different, diſtinct hands, as in England; the former will take care not to entruſt the latter with ſuch powers as may tend to deſtroy it's own independency.

The Britiſh conſtitution is neither an ariſtocracy, that is, where the government is in the hands of the nobles; a democracy, where it is in the hands of the people; nor a monarchy, where it is ſolely in the crown; but, it is a mixture of the whole, having the perfections of all, without the imperfections of either: for the executive power, or the power of enforcing the laws being lodged in a ſingle perſon, for ex-

ample in the king, the laws have all the advantages of ſtrength and diſpatch to be found in the moſt abſolute monarchy; where the king is ſupreme; and the legiſlature being entruſted to three diſtinct powers, totally independent of each other, viz. King, Lords and Commons; the Lords being an ariſtocratical aſſembly of perſons, ſelected for their piety, their wiſdom, their valour and their property; and the Commons, being a kind of democracy choſen by the people from among themſelves; a body actuated by different ſprings and attentive to different intereſts; no inconvenience is to be dreaded from either: each power having a negative voice, ſufficient to repel any inexpedient or dangerous innovation.

The executive power then in our conſtitution, is the King alone, who, of courſe, is ſupreme magiſtrate,; but the legiſlative authority, or the power of making laws, conſiſts of King, Lords and Commons, and is the parliament of Great-Britain.

It being part of the royal prerogative that no parliament can be called together, but by the king's authority; his writ or ſummons for this purpoſe is iſſued forty days before it begins to ſit. On the death of the king, if there be no parliament in being, the laſt parliament, re-aſſembles and ſits again for ſix months, unleſs diſſolved by the ſucceeding King. If prorogued only, it aſſembles immediately. But as the King only can convene a parliament, that law obliges him to call one within three years after the diſſolution of the former.

Now the conſtituent parts of a parliament are the King, Lords and Commons; and as an act muſt have the concurrence of theſe three branches, before it paſſes into a law, let us conſider theſe branches ſeparately. The firſt is the King, but of this we will ſpeak hereafter; the next is the houſe of Peers, which conſiſts of the Lords ſpiritual and temporal.

The ſpiritual Lords are the two Archbiſhops and twenty four biſhops; the temporal Lords are Dukes, Marquiſſes, Earls, Viſcounts and Barons, whoſe number may be encreaſed at the will of the King. Sixteen of theſe Peers are choſen by, and ſit as the repreſentatives of, the Peers of Scotland; the reſt hold their ſeats by deſcent or creation.

The Commons of England conſiſt of all ſuch men of property throughout the kingdom, as have not ſeats in the houſe of lords, every one of whom has a vote in parliament; but as the people of England are too numerous to aſſemble in any one place, certain diſtricts chooſe their repreſentatives who meet in parliament and vote for them. The counties are repreſented by Knights, elected by the freeholders or men of landed property; the cities and boroughs, by Citizens and Burgeſſes

Burgeſſes, choſen by the mercantile part of the people. The houſe of commons conſiſts of five hundred and fifty eight members, forty five of whom are choſen in Scotland and repreſent the people of that kingdom; the reſt repreſent the people of England.

The power of this parliament is ſo great as to have been called Omnipotent. It can new-model the ſucceſſion to the throne; alter the eſtabliſhed religion of the land; change, as it pleaſes, the conſtitution of the country; and what the parliament doth, no authority can undo.

The privileges of parliament are alſo very large, they having power to adopt what privileges they pleaſe. The members are free from arreſts in civil caſes, and to aſſault a member of either houſe, or any of his ſervants, is a high contempt, and puniſhed with great ſeverity.

The houſe of Peers is attended by the Judges and Maſters in Chancery, for their advice in law-matters. Every Peer, can, with the King's leave, appoint in his abſence, another Lord of Parliament to vote for him. This is called voting by proxy. Members of the other houſe cannot do this, they being only proxies themſelves. Each peer alſo has a right, by leave of the houſe, to enter on the journals his diſſent or proteſt againſt any determination paſſing contrary to his ſentiments.

Acts or bills that any way affect the rights of the peerage are to originate in the houſe of Peers, and to undergo no change or alteration in the houſe of commons. And it being an ancient liberty of the people not to have their property taken from them without their own conſent, all grants of taxes for the exigences of government, originate in the houſe of Commons; but as the Lords pay a proportion of the taxes, if they think the Commons too laviſh, they can reject them altogether, but cannot make the leaſt alteration in ſuch bills ſent up for their concurrence.

Knights of the ſhire, or members for the county, are choſen by the freeholders of that county. Every man having a freehold eſtate of forty ſhillings value per year, is entitled to vote for ſuch members; and the freemen of borough towns chooſe the members for thoſe boroughs. As trade fluctuates from town to town, it was formerly left to the King to ſummon ſuch towns as flouriſh moſt, to ſend repreſentatives; ſo that the citizens or burgeſſes in parliament increaſed as trade increaſed, or as towns became populous; but the miſchief is, the deſerted towns continue to be ſummoned equally with thoſe to which the trade and inhabitants were removed; ex-

cept ſome few, who petitioned to be eaſed of the expence of ſending members to parliament; the pay of a knight of the ſhire being then four ſhillings a day; that of a burgeſs, two ſhillings. Hence it is that the number of members, which in the reign of Hen, VI. amounted only to three hundred, are now five hundred and fifty eight.

It is not every man that is qualified to be choſen into parliament. They muſt not be minors, or foreigners born; they muſt not be any of the twelve judges, theſe ſitting in the houſe of lords; nor of the clergy, theſe ſitting in convocation; they muſt not be ſheriffs of the counties they are choſen for, nor mayors nor bailiffs of boroughs, theſe being the returning-officers; nor muſt they be concerned in the management of any duties or taxes created ſince 1692, except the commiſſioners of the treaſury; nor any of the commiſſioners of prizes, tranſports, ſick and wounded, wine-licences, navy and victualling office, nor ſecretaries or receivers of prizes, comptrollers of army-accounts, agents for regiments, governors of plantations or their deputies, officers of Gibraltar, exciſe or cuſtoms, clerks or deputies in the treaſury, exchequer, navy, victualling, admiralty, pay of the army or navy, ſecretary of ſtate's office, ſalt, ſtamps, appeals, wine-licences, hackney coaches, any contractors with goverment, nor any perſons that hold any new office under the crown created ſince 1705, or perſon having a penſion under the crown during pleaſure, or for any term of years, are capable of being elected or ſitting. And any member accepting an office under the crown, (except an officer in the army or navy accepting a new commiſſion,) vacates his ſeat, but he may be re-choſen. Repreſentatives of counties muſt have a clear eſtate in land to the value of £600. a year, and thoſe of boroughs to the value of £300. except they are the eldeſt ſons of Peers and of perſons qualified for knights of the ſhire, and except the members for the two univerſities; and of this qualification the member muſt make oath and give in the particulars in writing when he takes his ſeat.

And as freedom of election is eſſential to the very being of parliament, all undue influence upon the electors is illegal. Leſt the crown ſhould be ſuppoſed to interfere, all perſons belonging to the exciſe loſe their votes, and all ſoldiers quartered in any place where the election is held, are to remove before the election; nay it is forbidden for a peer or lord-lieutenant to interfere; and to avoid all danger of bribery, no candidate muſt give any money or entertainment to the electors, either directly or indirectly, on pain of incapacity

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to ſerve for that place in parliament, Nay, the ſheriff or returning officer ſwears that he is not bribed, and the electors, if required, are obliged to ſwear to their qualifications, and that they have not been bribed to give their votes.

The method of doing buſineſs is much the ſame in both houſes. Each houſe has it's ſpeaker. The Lord Chancellor or Lord Keeper is generally ſpeaker of the upper houſe, who regulates the formalities of buſineſs: the ſpeaker of the lower houſe is choſen by the members, but muſt be approved of by the King. The ſpeaker of the houſe of commons cannot give his opinion on any ſubject before the houſe, but the ſpeaker of the houſe of lords, if a lord of parliament, may. In both houſes, a majority of voices binds the whole, and this majority is given publicly and openly.

When an act of parliament of a private nature is wiſhed for, a petition is firſt preſented by ſome member, which, if founded on facts, that may be or are diſputed, it is referred to a committee of members to examine the matter, and then, (or on the petition itſelf if not oppoſed) leave is given to bring in a bill. If the matter is of a public nature, the bill is admitted on a motion made to the houſe by any member and ſeconded, even without a petition. This done, it is read a firſt time, and ſome little time after, a ſecond; after each reading, the ſpeaker acquainting the houſe with the ſubſtance of the bill, puts it to the vote, whether or not it ſhall proceed any further; if it is not objected to, after the ſecond reading, it is referred to a committee, which in matters of ſmall importance is ſelected by the houſe; or elſe the houſe reſolves itſelf into a committee of the whole body, which is compoſed of every member; in which caſe the ſpeaker quits the chair (another chairman being appointed) and may give his opinion as a private member. In ſuch committee the bill is diſcuſſed, clauſe by clauſe, and amendments, if any, are made. When it has gone through this diſcuſſion, it is then re-conſidered and the opinion of the houſe is taken upon every clauſe and amendment. This done, it is ordered to be engroſed or written on parchment; after this, it is read a third time. The ſpeaker then opens the contents of the bill again, and holding it up in his hands, takes the ſenſe of the houſe, whether the bill ſhall paſs? If agreed to, it is carried to the Lords for their concurrence, where it paſſes through ſimilar forms, and if agreed to by them, it waits the royal aſſent; if rejected, no notice is taken of it, to prevent improper altercations. If the Lords make any amendment to it, it is ſent down again to the Commons for their concurrence.

Should the Commons object to the amendment, a conference is held between members deputed by each houſe, to adjuſt the difference. Where both parties remain inflexible, the bill is dropped.

There are two ways of giving the royal aſſent. In perſon and by commiſſion. When in perſon, the King goes to the houſe of lords, puts on his crown and robes, (the peers being alſo robed) and ſending for the houſe of commons, the titles of all the bills that have paſſed or obtained the concurrence of both houſes are read, and the King's aſſent or diſſent is declared by the clerk of parliament. When done by commiſſion, it is notified to both houſes by certain commiſſioners appointed for that purpoſe. A bill thus receiving the royal aſſent becomes an act of parliament.

The only thing further to be mentioned reſpecting the parliament, is their manner of Adjournment, Prorogation, and Diſſolution.

Adjournment is a diſcontinuance of ſitting from one day to another, during the ſeſſion, as from Friday to Tueſday, or during the holidays, and is an act of the houſe itſelf; but they ſometimes adjourn at the pleaſure of the King, who, otherwiſe, on a refuſal, could prorogue them; prorogation being a diſcontinuance of their ſitting from one ſeſſions to another, and is an act of the Crown. Prorogation puts an end to the ſeſſion, and then all bills begun and not completed, muſt, if wiſhed for, be reſumed anew in a ſubſequent ſeſſion; whereas, after adjournments, things are again taken up in the ſtate in which they were left before adjournment.

A Diſſolution is the ending of any parliament, and may happen three ways. 1. By the will of the King; for if parliaments could continue themſelves, they might exiſt for ever, and thus too far encroach on the executive power. 2. By the death of the King; or 3. By length of time, that is at the expiration of ſeven years, for long parliaments might become corrupt: beſides, as the houſe of commons is formed by the people, a change of men may produce a change of meaſures.

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## Chap. Fifth.

### OF THE KING, &c.

BY the general conſent of the people, the ſupreme executive power is veſted in the crown; the authority then of this power ſhall next be conſidered, and in the following order:

order: 1. The title of the King; 2. His family; 3. His councils; 4. His duty; 5. His prerogative; and, 6. His revenue.

I. The crown or right of ſucceſſion is, by cuſtom, hereditary; but the right of inheritance is ſubject to be changed or limited by act of parliament; under which limitations the crown ſtill continues hereditary. That is, it is deſcendible to the next heir, male or female: but this hereditary right implies not a divine right; it is unqueſtionably in the breaſt of the legiſlature to defeat this hereditary right, exclude the immediate heir, and veſt the inheritance in any one elſe; but, however limited or transferred, it ſtill becomes hereditable in the wearer. Hence it is, that the king is ſaid never to die; but on the death of Henry or William, the King ſurvives in the ſucceſſor.

II. The queen-regent is the reigning queen in default of male iſſue, and has the ſame powers, prerogatives, &c. as if ſhe had been a king. But the queen-conſort or the wife of the King has leſs powers, &c. ſhe has, however, many privileges ſuperior to other married women.

The queen-conſort is a public perſon, diſtinct from the King, and like an unmarried woman, can purchaſe lands, make leaſes, &c. without the concurrence of her lord; ſhe can alſo take a grant from her huſband, which no other wife can. Common Law has eſtabliſhed this to prevent the King's being troubled with his wife's concerns.

The queen hath ſome exemptions alſo; but in general ſhe is on the ſame footing with other ſubjects, being to all intents and purpoſes the King's ſubject.

The perſon, however, of the queen, is equally protected with that of the King. It is high-treaſon to plot againſt her life; and it is alſo high-treaſon to violate the queen-conſort, as well in the violator as in the queen herſelf, if conſenting; and if a queen be tried, it muſt be by the peers of parliament: but the caſe is different in the huſband of a queen-regent, who, though her ſubject, and may commit treaſon againſt her, is not guilty of treaſon for conjugal infidelity; becauſe infidelity of the huſband to a queen-regent cannot baſtardize the heirs to the crown.

A king's widow is entitled to moſt of the privileges ſhe enjoyed as queen-conſort, except that it is not high-treaſon to conſpire her death, or to violate her chaſtity, the ſucceſſion of the crown being not thereby endangered: yet ſtill, for the royal dignity, none can marry a queen-dowager, without the king's conſent, under the penalty of forfeiting his lands and effects. But ſhe, though a foreigner, after the king's death

ſhall have dower, which no other foreigner has. If married to a ſubject, ſhe does not loſe her privileges, as do dowager peereſſes, when married to commoners.

The prince of Wales and his wife, and the princeſs-royal alſo have ſome peculiar privileges; it is high-treaſon to conſpire the death of the former or violate the chaſtity of either of the latter. More regard is had to the princeſs-royal than her ſiſters, ſhe being alone inheritable to the crown, on failure of male iſſue.

By the *royal family* is underſtood the younger ſons and daughters of the king and other of the king's relations, not immediately in the line of ſucceſſion. Theſe have precedence before all peers and officers of ſtate, whether eccleſiaſtical or temporal. The education of the preſumptive heir to the crown is now held to be under the care of the King; and by a late act, no deſcendant of the body of King George II. (except the iſſue of princeſſes married into foreign families) can marry without the King's conſent, unleſs they are twenty-five years old; nor even then, without twelve months notice being given to the privy council, or if in the courſe of thoſe twelve months both houſes of parliament expreſs their diſapprobation of the match. A marriage otherwiſe entered into will be void, and the miniſter and all perſons preſent incur the penalties of a *præmunire*.

III. Of the King's councils the principal one is the privy council. The number of members are indefinite, and at the pleaſure of the King; but they muſt be natural-born ſubjects. They ſit during the life of the King who nominates them, ſubject however to removal at his diſcretion; but, at the death of the King, they continue for ſix months, unleſs diſſolved by the ſucceſſor.

A privy counſellor takes an oath to adviſe the King without partiality, affection, or dread; to keep his counſel ſecret; to avoid corruption; to aſſiſt the execution of what is there reſolved; to withſtand all who oppoſe it, and to do all that a good counſellor ought to do. He is empowered to enquire into all offences againſt government, and commit the offenders to take their trial in ſome court of law.

The privy council is a court of appeal in plantation and admiralty cauſes, which ariſe out of the juriſdiction of the kingdom; and in matters of lunacy and idiocy. It's judicial authority is exerciſed by the whole body, who examine into the matter and make their report to his Majeſty in council, by whom judgment is given.

The

The privileges of a privy counſellor are certain protections of his perſon. It is felony in any of the ſervants of the King's houſhold to conſpire againſt his life; and felony without clergy to unlawfully aſſault or attempt to kill him in the execution of his office.

IV. With reſpect to the King's duty, I need only obſerve, that in his coronation oath, he ſwears "to govern according "to the ſtatutes; to cauſe law and juſtice, in mercy, to be executed in all his judgments; to maintain the laws of God, "the true profeſſion of the goſpel and the proteſtant reformed "religion; to preſerve unto the clergy, and to the church, "all ſuch rights and privileges as do or ſhall appertain unto "any of them."

V. Now for his prerogative, namely, that pre-eminence which the crown hath, above all other perſons, and out of the common courſe of the law.

Prerogatives are either *direct* or *incidental: direct*, are thoſe inherent in his political perſon, ſuch as the right of ſending ambaſſadors, of creating peers, and of making war and peace. *Incidental* prerogatives are only exceptions, in favour of the crown, to thoſe general laws eſtabliſhed for the good of the people: ſuch as, that the King ſhall pay no coſts; that a debt to the crown ſhall take place of any debt to the ſubject; &c. Theſe ſhall be explained hereafter. At preſent, we will conſider the *direct* prerogatives, which may be divided into three; ſuch as relate to the *character* of the King, to his *authority*, and his *revenue*.

1. The law aſcribes to the King *ſovereignty*. He is declared to be the ſupreme head both of the church and ſtate, and accountable to none. Hence it is, that no ſuit or action can be brought againſt him even in civil matters; becauſe no court can have any juriſdiction over him: if any one has a demand on the King in point of property, he petitions the court of Chancery, where his chancellor will adminiſter right as a matter of grace, not of compulſion: hence it is alſo, that however tyrannical and arbitrary may be the meaſures of the people, by law, the King's perſon is ſacred; no juriſdiction on earth having power to try him, much leſs to puniſh him: but, as the King cannot well miſuſe his power without the advice of evil miniſters, theſe men may be impeached, and puniſhed.

2. The law alſo aſcribes to the King, in his political capacity, abſolute *perfection*. It is an eſtabliſhed maxim that "the King can do no wrong." Which implies two things: 1. That whatever miſconduct there is in public affairs, the

King

King is not perſonally anſwerable for it; and, 2. That his prerogative being created for the good of the people, cannot be exerted to their prejudice.

But, notwithſtanding this conceived perfection, the conſtitution has allowed both houſes of parliament to ſuppoſe the contrary, either having a right to remonſtrate and complain to the King, even of thoſe acts of royalty that are perſonally his own; ſuch as meſſages ſigned by himſelf, and ſpeeches from the throne; yet to preſerve a reverence to the crown, ſuch meſſages or ſpeeches are deemed to flow from the advice of adminiſtration.

3. A third attribute aſcribed to the King is *perpetuity*. In his political capacity, the King can never die; for inſtantly on the death of the reigning prince, the crown or royal dignity is veſted in his heir. Hence the death of the prince is called the *demiſe*, or transfer of the crown.

*Secondly*, Let us ſpeak of the King's *authority* or power.

The King is ſole magiſtrate of the nation, every other acting under him by commiſſion. In the exerciſe of his lawful prerogative he is abſolute. He may reject any bill he pleaſes, make any treaty, create any peers, and pardon any offences, except ſuch where the conſtitution has interfered; but, if the exertion of this prerogative be extended to the injury or diſhonour of the nation, the parliament have a right to, and will, call his adviſers to account.

As far as the prerogative reſpects foreign nations, the King is the repreſentative of his people; what is done by his authority is the act of the nation; what is done without the King's concurrence is but the act of individuals: a ſubject's committing acts of hoſtility, therefore, on any nation in league with the King, is ſeverely puniſhable.

1. Sending and receiving ambaſſadors is a power veſted ſolely in the King; and as ſuch ambaſſadors repreſent the perſons of their ſovereigns, who owe no ſubjection to any laws but their own; the actions of an ambaſſador are not ſubject to the controul of the private law of the ſtate where he reſides. If he commits any crime, he may be ſent home and accuſed before his maſter, who is bound either to do juſtice upon him, or ſtand forth the accomplice of his crimes. But if an ambaſſador conſpires the death of the King in whoſe country he is, he may be condemned and executed for it.

In civil cauſes, neither the ambaſſador, nor any of his train, can be proſecuted for any debt or contract in that kingdom where he is ſent to reſide; except he is a trader within the deſcription of the bankrupt laws.

2. Making

2. Making of treaties, leagues, and alliances with foreign powers is alſo veſted in the King. And likewiſe,

3. The ſole power of making war and peace.

4. And of granting ſafe conducts: no ſubject of a nation at war with us, can come into the realm, nor paſs upon the ſeas, nor ſend his property from place to place, without danger of being ſeized by us, unleſs he has a paſſport ſigned by the King, or his ambaſſadors abroad.

In domeſtic matters, the King has a variety of other prerogatives, as,

1. He is one part of the legiſlative power, and has the power of rejecting bills in parliament: nor is he bound by any ſtatue, unleſs he be particularly named therein; except an act be made for the preſervation of public rights and ſuppreſſion of public wrongs, and does not interfere with the eſtabliſhed right of the crown; but, though not named in any particular act, he may, if he pleaſes, take the benefit of ſuch act.

2. The King is conſidered as the head of the army, and has the ſole power of raiſing and regulating the fleets and armies. This power extends alſo to forts and other ſtrong places within the realm. He is likewiſe inveſted with the power of appointing ports and havens. He may alſo prohibit the exportation of arms or ammunition, and may confine his ſubjects within the realm, or recall them when beyond the ſeas, on pain of fine and impriſonment when they return; becauſe, all men are bound to defend the King and the nation.

3. The King is alſo conſidered as the diſtributor of juſtice and the general preſerver of peace. He therefore has the ſole right of erecting courts of judicature. Hence it is, that all proceedings run in the King's name, and are executed by his officers.

In criminal proceedings, all offences are againſt the King, for the public being an inviſible body, and he their viſible repreſentative, all affronts to that body are offences againſt him; he is therefore the proper perſon to proſecute; and, of courſe, to pardon.

4. The King is alſo the fountain of honour, office, and privileges. All degrees of titles are by his immediate grant. All honourable offices under the crown are in his appointment, and he has alſo the power of conferring privileges.

5. He is alſo conſidered as the arbiter of domeſtic commerce: has the power of eſtabliſhing markets and fairs, and ſpecifying their tolls; of regulating weights and meaſures; and of coining, and giving value, and currency to, money.

6. The

6. The King is, laſtly, conſidered as the head of the church, and as ſuch he convenes, prorogues, reſtrains, and diſſolves the houſes of convocation, which are a parliament in miniature; the archbiſhop of Canterbury preſiding with regal ſtate; the upper houſe, conſiſting of the biſhops, and repreſenting the Houſe of Lords; the lower houſe, compoſed of repreſentatives choſen by the ſeveral archdeaconries and chapters, and reſembling the Houſe of Commons.

As head of the church, ariſes the King's right of nomination to vacant biſhoprics and other clerical preferments, and to him is the laſt appeal in chancery in all eccleſiaſtical cauſes.

VI. The laſt thing to be treated of under the preſent head, is the revenue of the King, which is of two kinds, *ordinary* and *extraordinary*. The ordinary revenue is that which has ſubſiſted in the crown time immemorial; or elſe has been granted by parliament in exchange for ſuch hereditary revenues as were found inconvenient to the public.

Parts of this ordinary revenue have been granted by different Kings to the public uſe, which has made the crown in ſome meaſure dependent on the people for its ſupport.

1. The firſt branch of this revenue is the cuſtody of the temporalities, or thoſe lay lands and tenements which belong to the ſees of biſhops. Theſe, on the vacancy of the ſee, are the property of the King, till a ſucceſſor is appointed; but, by cuſtomary indulgence, this revenue is reduced to nothing; for now, as ſoon as the new biſhop is confirmed, he receives from the King, on paying homage, the temporalties of his ſee, untouched.

2. The King is further entitled to the firſt-fruits and tenths of all ſpiritual preferments. The firſt-fruits were the whole profits of the firſt year, according to a rate ſettled in 1292. The tenths were a tenth part of the annual income of each living, by the ſame valuation. In the reign of Henry VIII. it was annexed to the crown, and that valuation made, by which the clergy are now rated. All benefices however under 50l. clear yearly value are, by ſtatutes of Queen Anne, diſcharged of the payment of firſt-fruits and tenths, and what the crown receives, by her bounty, is veſted in truſtees for ever, as a perpetual fund for the augmentation of poor livings.

3. The third branch of the revenue conſiſts of the rent and profits of the demeſne lands of the crown, that ſhare of land reſerved to the crown by the original diſtribution of landed property, or ſuch as it afterwards acquired by forfeitures:

feitures: theſe are divers manors and lordſhips, many of which have been ſince granted away to private perſons.

4. The King had alſo a revenue ariſing from military tenures, and from purveyance and pre-emption, which was a power of buying up proviſions for his houſhold, at one appointed valuation, in preference to others, and even without the owner's conſent; Charles II. reſigned theſe claims, for which the parliament ſettled on him, and his ſucceſſors, fifteen pence a barrel on all beer and ale ſold in the kingdom, and a proportionate ſum on other liquors, as will be mentioned by-and-by.

5. A fifth revenue ariſing from wine licences was ſettled on the crown in the 12th of Charles II. but this was aboliſhed under George II. and 7000l. a year iſſuing out of the ſame duties was given inſtead.

6. A ſixth branch ariſes from certain fines impoſed upon offenders in the courts of juſtice, by forfeitures of recognizances; fines upon defaulters, and from certain fees due to the crown in a variety of legal matters; ſuch as putting the great ſeal to charters, writs, &c. but theſe have been almoſt all granted out to private perſons, or appropriated to particular uſes, ſo that very little of them comes into the exchequer.

7. The next branch of the King's revenue ariſes from property confiſcated.

A deodand is another kind of forfeiture, ariſing from the misfortune of the owner rather than his crime, and is that perſonal property, whatever it be, which occaſions the death of a rational creature: as if a horſe, an ox, or other animal, kill either an infant or an adult; or if a cart run over him, they are in either caſe forfeited, as a puniſhment for the negligence of the driver.

8. An eighth branch ariſes from eſcheats of lands, owing to a defect of inheritance, that is, where there is no heir to the eſtate, it falls to the King.

9. The laſt branch conſiſts in the cuſtody of idiots, or thoſe born without the uſe of reaſon. The care of theſe unhappy perſons and their eſtates, is given to the King, to prevent a waſte of the eſtate, to the injury of the next heir. This branch of the revenue has been long conſidered as a hardſhip on private families; but as the King cannot take the eſtate, till a jury of twelve men has found the owner an idiot from his birth, it ſeldom happens, that they conſider him as ſuch, but as a lunatic, or *non compos mentis* from ſome particular time.

A perſon is never deemed an idiot, that hath any glimmerings of reaſon. But a man born deaf, dumb, and blind is conſidered as an idiot, wanting thoſe ſenſes that furniſh the mind with ideas.

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There are ſome other things from which the King formerly derived a revenue, ſuch as extra-parochial tithes, ſhip-wreck, gold and ſilver mines, treaſure-trove, waifs, eſtrays, that is, things found, and ſtray cattle; but as they are now loſt to the crown, I have not particularized them.

I have now run through the particular branches of the King's *ordinary* revenue, which was formerly very large, and capable of enormous extent; but as, through a ſeries of impolitic conduct, theſe are come to nothing; to ſupply the deficiencies, we are obliged to have recourſe to new methods of raiſing money, in which the King's *extraordinary* revenue conſiſts. Theſe extraordinaries are called aids, ſubſidies, and ſupplies, and are the various taxes levied by parliament; the neat produce of which amounts annually to about ten millions, clear of all expence, which is chiefly appropriated to pay the intereſt of the national debt.

This debt has, from time to time, accumulated ſince the Revolution, from the great expences the nation has been put to, more than its revenues could diſcharge. Hence the legiſlative power were obliged to borrow large ſums of money upon the faith of the nation, for which they now pay intereſt. The principal amounts to near 300 millions, the annual intereſt of which, is upwards of nine millions, and although the taxes raiſed to ſupport this expence are very uncertain, depending upon contingencies, ſuch as exports, imports, and home conſumptions, they have always been conſiderably more than ſufficient to anſwer the charge upon them. A million is now reſerved for the purpoſe of paying off the debt, which if it remains untouched, will by compound intereſt do it in little more than ſixty years; but, if the debt is at any time increaſed by wars, it will be longer firſt. The ſurplus is called the *ſinking* fund, being deſigned to ſink the national debt, by paying off, from time to time, ſuch portions of it, as this fund is capable of doing.

Beſides the intereſt of the national debt, a clear annuity of 900,000l. is appropriated to the purpoſes of the civil liſt, that is, to ſupport the King and his houſhold. The army and navy is an expence apart.

## Chap. Sixth.

### OF SUBORDINATE MAGISTRATES.

HAVING conſidered the great executive magiſtrate, we come now to ſubordinate ones; I mean ſuch as have juriſdiction and authority in different parts of the kingdom, viz.

viz. ſheriffs, coroners, juſtices of the peace, conſtables, ſurveyors of highways, and overſeers of the poor: and firſt, for the ſheriff.

1. The ſheriff was formerly choſen by the inhabitants of the county, as thoſe of Middleſex are by the city. In ſome they were hereditary, as at preſent in Weſtmoreland; but the cuſtom now is, that all the judges and other great officers meet on the morrow of St. Martin, and propoſe three perſons to the King, one of whom he afterwards appoints to be ſheriff. They are to continue in office only one year; and are not compellable to ſerve again for three years after.

The ſheriff is, in his official character, a judge, a keeper of the peace, a miniſterial officer of the upper courts of juſtice, and the King's bailiff.

He decides elections of knights of the ſhire (ſubject to the controul of the Houſe of Commons) of coroners and verderors; he judges of the qualifications of voters, and returns ſuch knights as he ſhall think properly elected.

As keeper of the peace, he ranks before any man in the county. He may commit to priſon all perſons breaking the peace, or attempting it, and may bind any one over to keep it. He is bound to purſue, apprehend, and commit all criminals: he is alſo, in invaſions, to defend his county againſt the enemy, and for this purpoſe he may raiſe the *poſſe comitatus*, that is, he may command the people of his county to attend him; and every perſon above fifteen years of age, and under the degree of a peer, is bound to obey his ſummons, on pain of fine and impriſonment; but he cannot try any criminal offence, nor can he, during his office, act as a juſtice of the peace.

As a miniſterial officer of the upper courts of juſtice, he is bound to execute all their proceſſes. In civil cauſes, he, or his ſubſtitutes, ſerves the writ, arreſts, and takes bail, ſummons and returns the jury, and ſees the judgment of the court carried into execution. In matters criminal, he alſo arreſts and impriſons, returns the jury, has cuſtody of the criminal, and executes the ſentence of the court, even in caſes of death.

As king's bailiff, he is to preſerve the King's rights within his county; to ſeize to the King's uſe all lands devolved to the crown by attainder or eſcheat; levy all fines and forfeitures; ſeize and keep all waifs, eſtrays, wrecks, and the like, unleſs granted to ſome private perſons; and, if commanded by proceſs from the Exchequer, muſt collect alſo the King's rents within his county.

For the execution of theſe various offices, he has under him many inferior officers; an under-ſheriff, bailiffs, and gaolers.

It

It is the buſineſs of the under-ſheriff to perform all the duties of the office of ſheriff, a very few only excepted, where the perſonal preſence of the high-ſheriff is requiſite.

Bailiffs, are either bailiffs of hundreds or ſpecial bailiffs. Bailiffs of hundreds are appointed by the ſheriff over certain diſtricts called hundreds, to collect fines, ſummon juries, attend the judges and juſtices at aſſizes and quarter-ſeſſions, and ſerve writs and proceſſes in the ſeveral hundreds; but as theſe, for the moſt part, are plain, artleſs men, and not ſufficiently ſkilled in ſerving writs and executions, ſpecial bailiffs are uſually joined with them, men who, from low cunning and dexterity, are better adapted to this part of their office; but the ſheriff being reſponſible for their conduct, they give ſecurity for their truſt.

Sheriffs are alſo anſwerable for the conduct of gaolers. The gaoler's buſineſs is to keep in ſafety all who are committed to his cuſtody, and if he ſuffers any ſuch to eſcape, if it be a criminal matter, the ſheriff ſhall anſwer to the King; if a civil, to the party injured. For this reaſon the ſheriff is always choſen from men of property, that he may be able to make ſatisfaction.

2. The coroner derives his name from having to do chiefly in pleas of the crown, and is choſen by the freeholders. In every county of England there are more or leſs, uſually four, but ſometimes ſix, and ſometimes fewer.

The coroner is choſen for life, but may be removed on being made ſheriff or verderor, which offices are incompatible with the other; infirmities, ſickneſs, want of ſufficient eſtate, living in an inconvenient part of the county, extortion, neglect, and miſbehaviour, are all cauſes of removal; and, if he conceals a felony, not doing his duty, through favour to the miſdoers, he ſhall be impriſoned a year, and be fined at the King's pleaſure, that is, at the pleaſure of the court.

His office is, to enquire into the manner of the death of any one who is killed, dies ſuddenly, or in priſon; but this muſt be on an inſpection of the body. For if the body be not found, the coroner cannot ſit. He muſt ſit alſo in the very place where the death happened; and his enquiry is made by a jury from any of the neighbouring towns over whom he preſides. If by this inqueſt any is found guilty of murder, he is to commit the offender to priſon for the trial, and alſo to make enquiry concerning his lands, goods, and chattels, which are forfeited thereby: and muſt certify the whole of the buſineſs to the court of King's Bench, or the next aſſizes.

3. The next order of ſubordinate magiſtrates are juſtices of

of the peace; the chief of whom is the *Cuſtos Rotulorum*, or keeper of the county records.

Theſe juſtices are nominated by the Lord Chancellor, or by the lord lieutenants of the ſeveral counties, and are appointed by the King. They are jointly and ſeverally empowered to keep the peace; and any two or more, may examine into and determine felonies and other miſdemeanors. The qualification for a juſtice of the peace is one hundred pounds a year, of which he muſt make oath; and if he acts without ſuch qualification, he forfeits one hundred pounds. No practiſing attorney, ſolicitor, or proctor, is capable of acting as a juſtice of the peace.

Juſtices are removable at the King's pleaſure, and their office is determinable in ſix months after the death of the the prince.

4. Of the officers of lower rank, the firſt is the conſtable. There are high conſtables and petty conſtables. The former preſide over the hundreds, are appointed by the juſtices at their quarter-ſeſſions, and are removable by the ſame authority. Petty conſtables are inferior officers in every pariſh, and ſubordinate to the high conſtable. They are appointed by two juſtices.

The duty of a conſtable, either high or petty, is to keep the peace; and for this purpoſe he has power to arreſt, impriſon, break open houſes, and the like. He may appoint watchmen at his diſcretion, regulated by the cuſtom of the place; who, being his deputies, are armed with his power. He has alſo a variety of leſſer duties.

5. Every pariſh is bound to keep the high roads, that go through it, in repair, unleſs they belong, by tenure or otherwiſe, to ſome private perſons. Pariſhes neglecting ſuch repairs, may be indicted for their neglect; and that ſome perſons may ſee this buſineſs done, ſurveyors of the highways are appointed in every pariſh, by two neighbouring juſtices from the ſubſtantial inhabitants.

Their duty is to carry into execution the ſtatutes made for the repairs of the public highways. This empowers them to remove all annoyances, or give notice to the owner to remove them, who is liable to penalties on non-compliance: and to call together the inhabitants and occupiers of lands, &c. within the pariſh, ſix days in every year, to aſſiſt in mending the roads, or pay others to do it.

6. Overſeers of the poor are alſo pariſh-officers. Till the reign of Hen. VIII. the poor ſubſiſted entirely on private charity; but under Elizabeth, overſeers in every pariſh were appointed,

appointed, who are to be nominated from ſubſtantial houſe-keepers yearly, by two neighbouring juſtices.

Their duty principally is, to raiſe competent ſums in the pariſh, for the neceſſary relief of their own poor; *viz.* the impotent, the old and blind, and ſuch of the poor as are not able to work, and to provide work for ſuch as *are* able and cannot get employ.

## Chap. Seventh.

### OF THE PEOPLE.

FROM treating of perſons, as *magiſtrates*, we will now conſider them as *people*; the firſt diviſion of which is into aliens and natural-born ſubjects.

Natural-born ſubjects are ſuch as are born *within* the dominions of the crown of England, and in allegiance to it. Aliens are ſuch as are born *out* of the King's dominions and allegiance.

Allegiance is that tie that binds the ſubject to the King, in return for the King's protection. The oath of allegiance, which is, "To be faithful and true to the King," muſt be taken by all perſons in any office, truſt, or employ under government, and two juſtices may tender it to any perſon whom they ſuppoſe diſaffected.

But, whether the oath be taken or not, there is an implied allegiance owing from all ſubjects to their ſovereign; ſo that whether they are in England, or in any other country; and whether they have reſided in ſuch other country, twenty days, or twenty years, if born in England, they owe allegiance to the Engliſh crown. Hence it is, that Engliſhmen abroad meet with the protection of our ambaſſadors.

An alien, living in this country, owes the King allegiance during his continuance here. An alien may purchaſe lands or other eſtates; but not for his own uſe; on pain of forfeiture to the King; for property in this kingdom would claim that allegiance to the crown, which, in fact, he could not pay. Yet, an alien may acquire a property in perſonal eſtate, that being of a nature that he may take away with him. Aliens may alſo trade, as freely as others, ſubject only to higher duties at the cuſtom-houſe: they may alſo recover their perſonal property at law; may make a will, and diſpoſe of their perſonal eſtate. In ſpeaking thus of aliens, I mean ſuch as belong to countries at peace with us; for alien-enemies, during war, have no rights or privileges, but by ſpecial favour of the King.

Perſons may be born out of the King's dominions, and yet not

not be aliens; for, all children born abroad, whoſe fathers (or grandfathers by the father's ſide) were natural-born ſubjects, are conſidered as natural-born ſubjects themſelves; unleſs their ſaid anceſtors were attainted or baniſhed for high-treaſon; or were, at the birth of ſuch children, in the ſervice of a prince at enmity with Great-Britain: ſo alſo are children of aliens, born in England.

An alien born, who has obtained letters patent to make him an Engliſh ſubject, is called a denizen. Such may take lands by purchaſe or deviſe, which an alien may not; but cannot take by inheritance; for his parent, through whom he muſt claim, being an alien, could not convey to his ſon; neither by parity of reaſoning, can the child of a denizen, born before denization, inherit from his father; but a child born after, may. A denizen is not excuſed from paying alien's duty; to be excuſed which, the alien muſt be naturalized by act of parliament; but it is a prerogative of the crown to grant letters of denization.

No man can be naturalized but by an act of parliament; but by ſuch an act he is put exactly into the ſituation of a natural-born ſubject; except that, like a denizen, he cannot be a member of the privy council or parliament, nor can he hold offices, grants, &c. under the crown. No perſon can be naturalized or reſtored in blood, except he receive the ſacrament, one month before the bill be brought in, and except he take the oaths of allegiance and ſupremacy, in preſence of parliament.

Every foreign ſeaman, who ſerves, in time of war, two years on board an Engliſh ſhip, by virtue of the King's proclamation, is naturalized; and all foreign Proteſtants, being three years employed in the whale fiſhery, without abſenting themſelves afterwards from the King's dominions, for more than one year, unleſs their fathers (or grandfathers by the father's ſide) were attainted or baniſhed the King's dominions, for high-treaſon, or were, at the birth of ſuch perſons, in the ſervice of a prince at enmity with Great-Britain, ſhall, upon taking the oaths of allegiance and abjuration, be naturalized to all intents and purpoſes, as if they had been born in this kingdom.

## Chap. Eighth.

### OF THE CLERGY.

THERE are two diviſions of the people; the clergy and the laity. The clergy have certain privileges allowed them. They cannot be compelled to ſerve on juries, nor appear

pear at court-leets, which almoſt all other perſons are obliged to do. Neither can they be choſen to any temporal office; as ſheriff, bailiff, conſtable, or the like. In caſes of felony, they ſhall have the benefit of clergy, without being burned in the hand, and may have it more than once, which no layman can. But, they have certain diſabilities; they are incapable of ſitting in the Houſe of Commons; nor can they engage in any manner of trade.

There are divers ranks and degrees of clergymen, *viz.* archbiſhops, biſhops, deans, prebendaries, archdeacons, parſons, vicars, and curates.

1. An archbiſhop or biſhop is, by virtue of a licence from the crown, called a *conge d'elire*, elected by the chapter of his cathedral church. This licence is accompanied with a letter containing the perſon's name the King would have choſen; and if the chapter delay the election above twelve days, the King may nominate and appoint by letters patent. And if ſuch chapter do not elect the perſon whom the King appoints, they ſhall in incur all the penalties of a *præmunire*.

An archbiſhop is the head of the clergy in the whole province, and governs the biſhops in ſuch province, as well as the inferior clergy, and may deprive them on lawful cauſes. The archbiſhop alſo has a dioceſe of his own, where he exerciſes epiſcopal juriſdiction, as he does archiepiſcopal in his province. On receipt of the King's writ, he calls the biſhop and clergy of his province to meet in convocation. To him are all appeals made from inferior juriſdictions within his province; and as an appeal lies to him in perſon from the biſhops in perſon, ſo it alſo lies from the conſiſtory courts of each dioceſe to his archiepiſcopal court. In the vacancy of any biſhopric in his province, he is guardian of the ſpiritualities, and he executes therein all epiſcopal juriſdiction. If an archbiſhoprick be vacant, the dean and chapter are the guardians. The archbiſhop is entitled to preſent, by lapſe, to all livings in the gift of his ſuffragan biſhops, if not diſpoſed of within ſix months. And when a biſhop is conſecrated by him, he has a cuſtomary privilege of naming a clergyman to be provided for by ſuch conſecrated biſhop; inſtead of which, the biſhop uſually now makes over, by deed, to the archbiſhop, his executors and aſſigns, the next preſentation of any dignity or benefice in the biſhop's diſpoſal, as dioceſan, which the archbiſhop ſhall chooſe; which is therefore called his *option*; but ſuch options are not binding on the biſhop's ſucceſſors. If the dignity or benefice does not fall vacant, during that biſhop's life

life or continuance in his ſee, the option is loſt. By cuſtom, it is the privilege of the archbiſhop of Canterbury to crown the kings and queens of England. He is empowered alſo to grant diſpenſations to clergymen to hold two livings, and to grant ſpecial licences to marry at any place or time. He has alſo the privilege of conferring degrees.

A biſhop, beſides the adminiſtration of ordination and other holy ordinances, has the authority to inſpect the manners of the people and the clergy, and to puniſh delinquents by eccleſiaſtical cenſures. To this end, he has ſeveral courts under him, and he may viſit at pleaſure, every part of his dioceſe. He appoints a chancellor to hold his courts for him, and to aſſiſt him in matters of eccleſiaſtical law. It is the office alſo of a biſhop, to inſtitute and direct induction to all benefices within his dioceſe.

Archbiſhoprics and biſhoprics may become void by death, deprivation, or for any very groſs or notorious crime, and alſo by reſignation, if the King thinks proper.

2. A dean and chapter are the biſhop's council, to aſſiſt him with advice, in matters of religion, or in the temporal concerns of his ſee. Some few of the deans are appointed by the biſhops of the dioceſe, the reſt by the King. The chapter conſiſts of canons or prebendaries, ſome of whom are appointed by the King, ſome by the biſhop, and ſome elected by the chapter itſelf. The dean and chapter, being the nominal electors of the biſhop, the biſhop is their ſuperior, and has the power of correcting their abuſes.

Deaneries and prebends may become void alſo by death, deprivation, or by reſignation to the King or biſhop. If a dean, prebendary, or other beneficed clergyman be made a biſhop, all the preferments he before held are void, and, on his conſecration, the King, by his prerogative, has the next turn of preſentation to them; let the patron be who he will.

3. An archdeacon hath, ſubordinate to his dioceſan, an eccleſiaſtical juriſdiction throughout the archdeaconry. He is uſually appointed by the biſhop, and has a kind of epiſcopal authority, independent of him. He viſits the clergy, and has his ſeparate court for hearing eccleſiaſtical cauſes, and puniſhing offenders by ſpiritual cenſures.

4. Another order of men, among the clergy, and indeed the moſt numerous, are rectors and vicars.

The rector, has, during his life, the freehold in himſelf of the parſonage houſe, glebe, tithes, and other dues. But theſe are ſometimes *impropriated;* that is, the benefice is never preſented, but perpetually annexed to the patron of the living,

whom the law allows to provide for the church by a ſubſtitute, called a vicar. This contrivance originated in the policy of monaſtic orders of men, who, by conſent of the King and the biſhop, begged and bought all the advowſons within their reach, appropriating the benefices to the uſe of their own body, and paying a prieſt ſome little ſtipend for ſerving the church. And at the diſſolution of the monaſteries, in the reign of Hen. VIII. the appropriations which belonged to thoſe religious houſes, were veſted in the King, which have been ſince granted out, from time to time, to private perſons.

The officiating miniſter of theſe benefices, was in reality no more than a curate or deputy; but, that the church might not be ill ſerved, or the deputy ſuffer by the mercenary diſpoſition of the appropriator, ſtatutes were made to empower the biſhop to ordain a competent ſum, to be annually paid him, according to the value of the benefice; and, to oblige the appropriator to endow the vicarage ſufficiently; making ſuch vicar perpetual.

To become a rector or vicar, there are four neceſſary requiſites: ordination, preſentation, inſtitution, and induction. A man becomes either a deacon or a prieſt, by ordination. To be a deacon, a man muſt be between twenty-two and twenty-three years of age, and to be a prieſt, twenty-four years of age: no man can hold a living till he is ordained a prieſt, or be a biſhop, till he is thirty years of age. Whilſt a man is only deacon, he can quit his profeſſion for any other, but not ſo, when once ordained prieſt. None can adminiſter the ſacrament but a prieſt; nor, can a deacon preach, without being firſt licenced by the biſhop. If any man obtain orders, or a licence to preach, by money or corrupt practices, the biſhop, on conferring ſuch orders, forfeits forty pounds, and the perſon receiving them, ten pounds, and is incapable of any eccleſiaſtical perferment for ſeven years after.

A patron, to whom the advowſon of the church belongs, may preſent any clergyman to the biſhop of the dioceſe, for inſtitution, (or any layman, but he muſt take prieſt's orders before his admiſſion,) who may be refuſed by the biſhop on ſeveral accounts. As, 1. If the patron be excommunicated. 2d. If the clergyman preſented be an outlaw, excommunicated, an alien, under age, guilty of any hereſy or groſs immortality, or inſufficient in point of learning.

If an action be brought againſt the biſhop for refuſing to inſtitute the perſon preſented, the biſhop muſt aſſign the cauſe, which is tried by a jury; if it be want of learning, he may alledge only inſufficiency; and the court of King's Bench will

write

write to the metropolitan to re-examine him, and certify his qualifications, and this certificate is final.

Where the biſhop does not object, he proceeds to inſtitution, which is inveſting the prieſt with the cure of ſouls. When a vicar is inſtituted, he takes an oath to reſide, unleſs diſpenſed with by the biſhop; for a vicar cannot have a ſubſtitute, being only a ſubſtitute himſelf. By inſtitution, the living is full, and no further preſentation can be made, till a freſh vacancy, at leaſt, in the caſe of a common patron; but, where the King is patron, the living is not deemed full, till after induction; which is performed by a mandate from the biſhop, to the archdeacon, who uſually iſſues out a precept to ſome neighbouring clergyman to do it for him. It is done, by giving the prieſt poſſeſſion of the church, as by his holding the ring of the door, tolling the bell, or the like. A clerk thus preſented, inſtituted, and inducted, is in complete poſſeſſion.

The rights of a rector, or vicar, in his tithes and dues, we ſhall treat of hereafter; but I will juſt mention the article of reſidence, on the ſuppoſition of which, the law calls him an incumbent. Perſons wilfully abſenting themſelves from their benefices for one month together, or two months in the year, forfeit five pounds to the King, and five pounds to any perſon ſuing for the ſame, except chaplains to the King, and chaplains to noblemen during their attendance in the houſholds of ſuch as retain them; and, except all heads of colleges, magiſtrates, and profeſſors in univerſities, and all ſtudents under forty years of age, reſiding there for ſtudy. Legal reſidence is not only in the pariſh, but in the parſonage, or vicarage houſe, if there be one; if not, the incumbent muſt hire one, in the ſame, or ſome neighbouring pariſh.

Livings may be vacated ſeveral ways. As, 1. By death. 2. By ceſſion, in taking another benefice; for, if any one, having a benefice of eight pounds a year or upwards in the King's books, accepts any other, the firſt is void, unleſs he obtains a diſpenſation; which none can have but a maſter of arts, in one of our univerſities, who is a chaplain to the King, or ſome nobleman, or the brother, or ſon, of a lord or knight, or ſuch as have taken the degree of doctor of divinity, or bachelor of law. 3. By conſecration; for, as we before obſerved, when an incumbent is promoted to a biſhopric, all his other preferments are void the inſtant he is conſecrated: though by favour of the crown, he ſometimes holds his former preferment *in commendam;* that is, a living commended by the crown, to the care of a clergyman, till a proper paſtor

is provided: which may be for a time, or a perpetuity, 4. By reſignation. But this is uſeleſs, till accepted by the dioceſan. 5. By deprivation; for groſs crimes, ſuch as treaſon, felony, hereſy, groſs immortality; ſimony; maintaining any doctrine in derogation to the King's ſupremacy, the thirty-nine articles, or the book of common-prayer; or, for neglecting, after inſtitution, to read the liturgy and articles in the church, make the declarations againſt popery, or to take the oath of abjuration; or, for uſing any form of prayer but that of the church of England; or, for abſenting himſelf ſixty days in one year, from a benefice belonging to a popiſh patron, to which the incumbent was preſented, by either of the univerſities; in all which, and ſimilar caſes, the benefice is void, even without any formal ſentence of deprivation.

5. A curate is an aſſiſtant to the rector, or vicar. Though there are perpetual curacies, where all the tithes are appropriated, and no vicarage endowed, but the curate is appointed by the appropriator, and continues for life under the licence of the biſhop. Biſhops may allot ſuch a ſtipend to a curate, not exceeding fifty pounds a year, nor leſs than twenty pounds, out of the profits of the living, as he ſhall judge proper; and oblige the incumbent to pay it, on pain of having the profits of his benefice ſequeſtered. The biſhop alſo can licenſe the curate, and oblige the incumbent to continue him as ſuch, whilſt he thinks proper to have aſſiſtance in his duty.

So much for the clergy. There are alſo ſome inferior eccleſiaſtical officers, of whom the Common Law takes notice, *viz.* churchwardens, pariſh-clerks, and ſextons.

1. Churchwardens are generally two, and are the guardians of the church, and repreſentatives of the body of pariſhioners. They are ſometimes appointed by the miniſter, ſometimes by the pariſh, and ſometimes by both, each appointing one, as cuſtom directs. They are a kind of body-corporate, in favour of the church, may have a property in goods and chattels, and may bring actions for them: if they waſte the church-goods, they may be called to account for ſo doing; but, as to land or other real property, ſuch as the church itſelf, the church-yard, &c. theſe are the property of the rector. Their duty is to repair the church, and levy rates, for that purpoſe. They alſo, with the overſeers, have the care and management of the poor. They have alſo a multitude of other leſſer parochial powers, committed to their charge, by acts of parliament.

Pariſh-clerks and ſextons are perſons who have freeholds in their

their offices; and, therefore, though they may be puniſhed by eccleſiaſtical cenſures, they cannot be deprived by them.

Formerly, pariſh-clerks were in holy orders, and ſome are at this day; appointing laymen to officiate for them. The clerk is generally appointed by the incumbent, though cuſtom in ſome places gives the appointment to the pariſhioners. When appointed, he is ſworn in by the archdeacon, and often licenſed by the biſhop.

## Chap. Ninth.

### OF THE LAITY.

THE laity may be divided into three diſtinct ſtates, the civil, military, and maritime. We will begin with the civil.

I. This includes all orders of men, excepting the clergy, and thoſe included under the ſtates military and maritime.

The civil ſtate, then, comprehends the nobility and commonalty.

1. Of the nobility, the peerage conſiſting of the Lords Spiritual and Temporal, we have already treated; we have only here to conſider their titles.

All titles and degrees of honour are derived from the King. Excluſive of thoſe privileges of a peer, which have been before conſidered; every peer has, in criminal caſes, the privilege of being tried by his peers: and, is thus out of danger from the envy or prejudice of the populace. Biſhops are not entitled to this privilege, being only temporary peers. If a woman be a peereſs in her own right, though ſhe marry a commoner, ſhe does not loſe this privilege: but, if ſhe is noble only by marriage, by a ſecond marriage with a commoner, ſhe does. If a ducheſs marries a baron, ſhe is ſtill a ducheſs, for all the nobility are *pares*, and therefore it is no degradation. A peer, or peereſs, (either in her own right, or by marriage,) cannot be arreſted in civil ſuits. A peer, ſitting in judgment, gives in his verdict, only upon honour. He puts in his anſwer alſo to a bill in Chancery, not upon oath, but upon honour; but, if examined as a witneſs at a trial, he muſt be ſworn. The honour of a peer, in ſhort, is ſo highly thought of in law, that ſcandal againſt them is called *ſcandalum magnatum*. There are ſeveral degrees of

the commonalty, as may be ſeen in tables of precedence, § where perſons are ranged, according to the rank they bear; either by ſtatute, letters-patent, or by antient uſage.

II. The military ſtate includes all the land-forces, or the whole of the ſoldiery.

A national militia is part of this ſtate; the general ſcheme of which is, to diſcipline a certain number of the inhabitants of every county, choſen by lot, for three years, and officered by the lord-lieutenant, the deputy-lieutenants, and other principal land-owners, under a commiſſion from the crown. They cannot be compelled to march out of their own counties, except in caſes of invaſion, or actual rebellion, within the realm (or any of its dominions) nor in any caſe can they be forced to march out of the kingdom. In time of peace, they are exerciſed for one month in the year; in the time of commotion, they are embodied, have the pay of a regular ſoldier, and are under martial law.

By the Bill of Rights it is declared, that a ſtanding army, within the kingdom, in time of peace, unleſs it be with conſent of parliament, is againſt law; but, of late years, it has been judged neceſſary by our legiſlature, to raiſe an army under the command of the crown, which is *ipſo facto* diſbanded at the expiration of every year, unleſs continued by parliament.

To keep this body of troops in order, an annual act of parliament is likewiſe paſſed, to puniſh mutiny and deſertion, &c. This act regulates the manner in which they are to be quartered, and eſtabliſhes a law martial, for their government.

A weekly allowance is to be raiſed in every county, for the relief of ſoldiers that are ſick, hurt, and maimed, and the hoſpital at Chelſea is appropriated to ſuch as are worn out in the ſervice. Officers and ſoldiers, that have been in the King's ſervice, are by ſeveral ſtatutes, enacted at the cloſe of wars, allowed to ſet up any trade or occupation, in any town in the kingdom, except the two univerſities. And ſoldiers, in actual ſervice, may make nuncupative, or verbal wills, and diſpoſe of their wages and effects, without thoſe forms and expences the law enjoins in other caſes.

III. The maritime ſtate is very ſimilar to the military. The preſent condition of our marine is, in a great meaſure, owing to the navigation acts, whereby Engliſh ſhipping and ſeamen have been conſtantly increaſed. Theſe prevent all ſhips of

§ *Vide* TRUSLER'S CHRONOLOGY, *Vol.* 2.

foreign

foreign nations from trading with any Engliſh plantation, without licence from the council of ſtate. In 1651, the prohibition was extended to England, and no goods could be imported but in Engliſh bottoms, or in ſhips of that European nation, of which the merchandize imported, was the genuine growth or manufacture. At the reſtoration this very material improvement was made, that the maſter and three-fourths of the ſeamen ſhould be Engliſh ſubjects.

Many ſtatutes have been made to ſupply the navy with men; to regulate them on board, and reward them during the time of, and after, their ſervice.

1. In order to ſupply the navy with men, bounties are continually given; but, where bounties are ineffectual, recourſe is had to impreſſing; the legality of which, though it has been a matter of ſome diſpute, is certain.

But there are other means of manning the navy. Pariſhes may bind out poor boys apprentices to maſters of merchantmen, who are protected from being impreſſed, for the firſt three years; and, if impreſſed afterwards, maſters ſhall have their wages. Great advantages are given to volunteer ſeamen, to induce them to enter into his majeſty's ſervice; and, every foreign ſeaman, who, during a war, ſhall ſerve two years on board any ſhip of war, merchantman, or privateer, is *ipſo facto* naturalized.

2. A regular diſcipline in the fleet is kept up by certain expreſs articles and orders, enforced by act of parliament. In theſe articles, almoſt every poſſible offence is enumerated, and its puniſhment annexed; an advantage which the ſoldier does not experience, the articles of war not being enacted by ſtatute, but framed from time to time, at the pleaſure of the crown.

3. The privileges of ſailors, are much the ſame with thoſe of ſoldiers. Greenwich Hoſpital is appropriated to the relief of thoſe who are maimed, wounded, or ſuperannuated; and, county rates are raiſed for their ſupport. Seamen have the ſame privileges with reſpect to exerciſing trades, and making verbal or nuncupative wills; and, no ſeaman aboard the King's ſhips, can be arreſted for a leſs ſum than twenty pounds.

## Chap. Tenth.

### *Of the People, in their Private Relations to each Other.*

THE three great relations in private life, are, 1. That of maſter and ſervant; 2. huſband and wife; 3. parent and child. To which we may add, being a kind of artificial

parentage, 4. That of guardian and ward. We will treat of theſe in their turns; and firſt,

I. Of maſter and ſervant. In ſome countries, ſervitude is a degree of ſlavery; but, the law of England abhors the idea. Inſomuch that it is laid down, that a ſlave or negro, the inſtant he lands in England, becomes a free man; that is, the law will protect him in the enjoyment of his perſon, and his property: but, the maſter's right to his ſervice remains as before; ſervice in this ſenſe, being no more than that ſtate of ſubjection for life, which every apprentice ſubmits to for a term of years.

There are ſeveral ſorts of ſervants, the firſt of which are menial or domeſtic ſervants. The agreement between ſuch and their maſter, ariſes from hiring. If this hiring be general, without any particular time limited, the laws conſtrue it for a year; but the agreement may be made for a longer or ſhorter term. All unmarried men, between twelve and ſixty, and married men, under thirty years of age, and all unmarried women, between twelve and forty, having no viſible way of living, may be compelled to go out to ſervice, in huſbandry, or certain ſpecific trades: and, no maſter can put away his ſervant, or any ſervant leave his maſter, after being ſo hired, either before or at the end of his term, without a quarter's warning, unleſs with the conſent of both, or by ſpecial agreement, and unleſs upon reaſonable cauſe to be allowed by a juſtice of the peace.

A ſecond ſort of ſervants are apprentices, bound uſually for a term of years to maſters, who are to maintain and inſtruct them in the buſineſs they follow. With ſuch are often given large ſums of money, as premiums: but, apprentices may be bound to huſbandmen, to gentlemen, and others. Children of the poor may be apprenticed out by the overſeers of the pariſh to which they belong, and with the conſent of two juſtices, till they are twenty-four years old; and, ſuch perſons as are thought fitting, are compellable to take them; and it is held, that gentlemen of fortune, and clergymen, are equally liable with others to this compulſion. Apprentices to trades may be diſcharged on reaſonable cauſe, either at the requeſt of themſelves or their maſters, at the quarter-ſeſſions, or by one juſtice, with appeal to the ſeſſions; who may direct the maſter to return a proportionable part of the money given with the apprentice, according to the time he has had ſuch apprentice. Pariſh apprentices may be diſcharged in like manner, by two juſtices; but, if an apprentice, with whom leſs than ten pounds

pounds apprentice-fee hath been given, runs away from his maſter, he may be obliged to ſerve out his time of abſence, or make ſatisfaction for the ſame, at any time, within ſeven years after the expiration of his original contract.

A third ſpecies of ſervants are labourers, hired by the day or week: concerning whom the laws, direct that all perſons having no viſible effects may be compelled to work, ſpecifying the many hours they muſt continue at work, in ſummer and winter; puniſh ſuch as deſert their work; empower juſtices at ſeſſions, or the ſheriff of the county, to ſettle their price of work; and, inflict penalties on ſuch as give or exact for work more wages than what is ſettled.

A fourth ſpecies are ſtewards, factors, and bailiffs, whom the laws regard, as far as their acts affect their maſters property.

A maſter may by law, correct his apprentice for negligence or miſbehaviour; ſo as it be done with moderation: but a maſter or miſtreſs, beating any other ſervant of full age, is ſufficient cauſe of quitting them. Servants, workmen, or labourers, aſſaulting their maſter, or maſter's wife, ſhall ſuffer one year's impriſonment, and other open corporal puniſhment.

A maſter may aſſiſt his ſervant in any action at law againſt a ſtranger; whereas, ſuch a ſtep in general is an offence. A maſter may alſo proſecute a man for beating his ſervant; but, in ſuch caſe, he muſt prove a loſs to himſelf. He may alſo juſtify an aſſault in defence of his ſervant; ſo may the ſervant in defence of his maſter; they being intereſted in the ſervice of each other. If any perſon hire my ſervant, knowing him to be mine, and he quits my ſervice accordingly, I can recover damages both againſt the new maſter and the ſervant; provided ſuch maſter refuſes to reſtore ſuch ſervant upon demand.

Maſters are anſwerable for the miſconduct of their ſervants, if ſuch miſconduct is owing to the maſter's command. If a ſervant commits a treſpaſs by order of his maſter, not only the maſter is deemed guilty, but the ſervant alſo, he not being bound to obey his maſter, but in things legal and honeſt. If an inn-keeper's ſervant robs the gueſts, the maſter is bound to reſtitution; becauſe, he ſhould have taken care to have had honeſt ſervants. So, if a waiter at a tavern ſells a man bad wine, that injures his health, the maſter muſt anſwer for it; for even ſuffering the waiter to draw and ſell it, implies a command.

By the ſame way of reaſoning, whatever a ſervant is permitted

mitted to do, in the uſual courſe of his buſineſs, is equivalent to general command. If I pay money to a gentleman's ſervant, who does not uſually receive money for his maſter, and he embezzles it, I muſt pay it again; but, if I pay it to a banker's clerk, the maſter is anſwerable. If a ſteward lets the leaſe of a farm, without his maſter's knowledge, the maſter muſt abide by the agreement, this being the ſteward's buſineſs. So a wife, or a friend that tranſacts buſineſs for a man, are conſidered as his ſervants in that reſpect, and he muſt anſwer for their conduct. If I uſually deal with a tradeſman myſelf, and conſtantly pay him ready money, I am not reſponſible for what my ſervant takes up upon truſt; but, if I uſually ſend him upon truſt, or ſometimes on truſt, and ſometimes with money, I am anſwerable for all he takes up, as the tradeſman cannot be ſuppoſed to know, when he comes by my order, and when upon his own authority.

If a ſervant, employed by his maſter, by negligence, does a ſtranger an injury, the maſter muſt make it good. A maſter is alſo reſponſible, if any of his family throw any thing out of his houſe, into the ſtreet or highway, to the injury of any individual, or prove a common nuiſance.

But, contrary to Common Law, if any houſe is ſet on fire, through the negligence of a ſervant, the maſter ſhall not be anſwerable for the injury; but, ſuch ſervant ſhall forfeit one hundred pounds, to the ſufferers; or, ſhall be committed, and kept to hard labour for eighteen months.

II. The ſecond private relation in life, is, that of huſband and wife.

The civil law conſiders marriage in no other light, than as a civil contract, and, like other contracts, allows it to be good, where the parties are *willing* and *able* to contract, and actually *did*, in the proper form and mode.

All perſons are able to contract marriage, that do not labour under certain incapacities: ſuch, as pre-contract; being too near of kin; too nearly related by marriage; or ſome corporal infirmities. But theſe are canonical diſabilities, and only make the marriage voidable when brought before an eccleſiaſtical court: till ſentence of ſeparation is paſt, marriages with ſuch incapacities are conſidered as valid. If a man marries his firſt wife's ſiſter, and ſhe dies before the matter is taken cognizance of; any children ſhe may have will be legitimate, but the huſband may be puniſhed for inceſt. Any two perſons may marry that are not nearer of kin than firſt couſins.

Legal diſabilities, of which the civil courts take notice, and

and which render the marriage null in itſelf, are, a prior marriage; want of ſufficient age; want of parents or guardians conſent; want of reaſon; and not being ſolemnized in due form.

1. Where there is a huſband or wife living, a ſecond marriage is void of courſe, and the perſon ſo marrying, is guilty of felony. This is called Polygamy.

2. If a boy under fourteen, marries a girl under twelve, the marriage is void; and, though they live together to the age of conſent, which is fourteen in the boy, and twelve in the girl, they may ſeparate if they pleaſe, without any ſentence of the ſpiritual court: but, if at the age of conſent, they agree to continue together, a freſh marriage is unneceſſary. If the huſband be of years of diſcretion, and the wife under twelve, either may diſagree, and ſo *vice verſa*; for in all contracts, both muſt be bound or neither.

3. A third diſability ariſes from want of conſent of parents or guardians. A fine of one hundred pounds is laid on every clergyman marrying a couple, either without publication of banns, or without a licence, to obtain which, the conſent of parents or guardians muſt be ſworn to; and, whoever marries any woman-child under the age of ſixteen years, without the conſent of parents or guardians, ſhall be fined, and ſuffer five years impriſonment; and her eſtate during her huſband's life, ſhall go to the next heir: and all marriages by licence, (for banns ſuppoſe notice,) where either of the parties is under the age of twenty-one, (not being a widow or widower,) without the father's conſent, or the mother or guardians, if the father be not living, ſhall be void.

4. A fourth incapacity is want of reaſon: the marriage of lunatics, (if found ſo under a commiſſion,) before they are declared of ſound mind by the Lord Chancellor, or the majority of truſtees, ſhall be void.

5. A fifth diſability, is where parties have not been married according to the proper forms: all contracts of marriage, without ſolemnization, are declared of no force: and, no marriage at preſent is valid, that is not celebrated by a clergyman, by publication of banns, or by licence, in ſome pariſh-church, or public chapel; unleſs, under a ſpecial licence from the archbiſhop of Canterbury.

Marriages are diſſolved only by death or divorce. There are two kinds of divorces; the one total, *a vinculo matrimonii*, the other partial only, *a menſa et thoro*. The total divorce muſt be for ſome of the canonical cauſes of impediment, exiſting *before* marriage, as, in being too nearly related by blood;

not riſing *after* marriage, as being too nearly allied by ſuch marriage, or, as having ſome corporal imbecility. For in caſes of total divorces, the marriage is declared null and void, and the iſſue of ſuch marriages is illegitimate. But divorce *a menſa et thoro* is partial, and is merely a ſeparation, as in the caſe of ill behaviour between man and wife, or adultery. In adultery, indeed, the married couple may be totally divorced, but this muſt be by act of parliament.

In partial divorces *a menſa et thoro*, the law allows the wife a maintenance, which is called alimony, and that ſettled by the eccleſiaſtical judge; and, it is generally proportioned to the rank and quality of the parties. But in caſe of elopement, and living in adultery, the law allows the wife no alimony.

By marriage, the huſband and wife, are one perſon. For this reaſon, a man cannot grant any thing to his wife, or enter into covenant with her. A woman, indeed, may be attorney for her huſband, for that implies no ſeparation. And a huſband may bequeath any thing to his wife, as this does not take effect till after his death. The huſband, by law, muſt provide his wife with neceſſaries, and if ſhe contracts debts for neceſſaries, he is obliged to pay them. If a wife elopes, and lives with another man, the huſband is not chargeable even for neceſſaries, eſpecially, if the perſon furniſhing ſuch neceſſaries be apprized of the elopement. And if a woman elopes from her huſband, though ſhe does not go away with an adulterer, or in an adulterous manner, the tradeſman truſts her at his peril, and the huſband is not bound, unleſs he refuſe to receive her again. If the wife be indebted before marriage, the huſband ſhall pay the debt, having adopted her and her circumſtances; but, if a wife die before ſuch debts be paid, the huſband, provided he has not engaged himſelf to pay them, is not obliged to do it. If a wife be injured in her perſon or property, ſhe cannot proſecute, but in her huſband's name, as well as her own, and by his concurrence; neither can ſhe be ſued without making the huſband defendant. There is one exception to this general rule, that is, where the huſband has abjured the realm, or is baniſhed; for then he is dead in law. In criminal proſecutions, a wife may be indicted and puniſhed ſeparately, the union between man and wife being only a civil union: but on trials of any kind, they are not allowed to be evidence for or againſt each other. But where the offence is directly againſt the perſon of the wife, this rule has been diſpenſed with, for, in caſe a woman be forcibly taken away and married, ſhe may be an evidence

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againſt ſuch huſband, in order to convict him of felony; being here not accounted his wife, but married againſt her own conſent.

In the eccleſiaſtical courts, a woman may ſue and be ſued, without her huſband; man and wife being there conſidered as two diſtinct perſons. Indeed, in our law, there are ſome inſtances in which the wife is ſeparately conſidered, as inferior to her huſband, and acting by his compulſion. All deeds therefore, and acts done by her, are void, except they be fines, or the like matter of record, in which caſe, ſhe muſt be ſolely and ſecretly examined, to find out whether her act be voluntary. She cannot by will bequeath lands to her huſband, unleſs under ſpecial circumſtances; being ſuppoſed, at the time of making her will, under his coercion. And in ſome felonious matters, and other crimes of an inferior kind, committed by her, the law excuſes her; but not in murder, or ſome ſpecies of treaſon. No man can beat his wife, if he does, ſhe may bind him over to his good behaviour, as may the huſband the wife; but, the courts of law will permit a huſband to confine his wife, in caſe of any groſs behaviour.

III. The next and moſt univerſal relation in nature is that of parent and child. Children, in the eye of the law, are of two ſorts; legitimate and illegitimate.

1. Legitimate children, are ſuch as are born in wedlock, or within a reaſonable time after, and the duty of parents, to ſuch children, conſiſts in maintaining, protecting, and educating them.

Maintenance of children is, an obligation of the higheſt nature, and the law of this kingdom enforces it. The father, mother, grand-father, and grand-mother, of poor impotent perſons, ſhall, if able, maintain them, as the quarter-ſeſſions directs: and, if a parent runs away, and leaves his children, the churchwardens and overſeers of the pariſh ſhall ſeize his rents and effects, and diſpoſe of them towards their relief. And, if a mother, or grand-mother marries again, and was able to keep the child or children before ſuch marriage, the huſband ſhall be obliged to do it; it being a debt of hers, which he is obliged to pay: but at her death, the relationſhip being diſſolved, the huſband is no farther bound.

No man is bound to maintain his children, unleſs, through infancy, diſeaſe, or accident, they are unable to work, and even then he is only to provide them with neceſſaries, the penalty on refuſing, being only twenty ſhillings a month. But it is enacted, That if any Popiſh or Jewiſh parent, ſhall refuſe to allow his proteſtant child a fitting maintenance, with a

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view to compel him to change his religion, the Lord Chancellor may oblige him to do what is juſt and reaſonable.

Protection of children is alſo the duty of a parent. A parent may, by our laws, ſupport his children in any law-ſuit; and may juſtify an aſſault in defence of them.

In point of education, parents are left to their own option. But if any perſon ſends a child under his care, beyond the ſeas, in order to enter into, or reſide in any Popiſh college, or to be inſtructed, or ſtrengthened in the Popiſh religion; beſides the diſabilities incurred by the child ſo ſent, the perſon ſhall forfeit one hundred pounds, to the perſon diſcovering the offence: And, if any perſon ſhall ſend any one beyond ſea, to be trained up in any priory, nunnery, Popiſh univerſity, college, or ſchool, or houſe of Jeſuits, or prieſts, or in any private Popiſh family, in order to be inſtructed in the Popiſh religion; or, ſhall contribute any thing towards his maintenance when abroad, the perſon, both ſending and ſent, ſhall be diſabled to ſue in law or equity, or to be executor or adminiſtrator to any perſon, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and ſhall forfeit all his goods and chattels, and likewiſe all his real eſtate for life.

The power of parents over their children, allowed by our laws, is not rigorous, but ſufficient to keep them in obedience. A parent may correct the child in a reaſonable manner, while under age. Without a father's conſent to the marriage of his child in a reaſonable manner, while under age, the marriage will be void. But a father has no other power over his ſon's eſtate, than as his truſtee; for, though he may receive the profits of ſuch eſtate during his ſon's minority, yet he muſt account for them when the boy comes of age. He may have the benefit of his children's labour, whilſt they are maintained by him. The legal power of a father, (for a mother is only entitled to reſpect,) over his children, ceaſes, when they arrive at the age of twenty-one: yet, till that time, he has the command of them, and may by will appoint them a guardian. He may alſo, during his life, delegate part of his parental authority to a ſchoolmaſter or tutor, who, in conſequence of ſuch delegation, may reſtrain or correct them.

With reſpect to the duties of children to their parents: to thoſe who gave us exiſtence, and protected us in infancy, we naturally owe ſubjection and obedience, during our minority; honour and reverence ever after, and protection in the infirmity of their age. A child, by our laws, is juſtifiable in defending the perſon, or maintaining the cauſe of a parent, and,

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if of ſufficient ability, is bound, in honour and gratitude, to provide for him, though the parent may be wicked and unnatural.

2. In the caſe of illegitimate children or baſtards; the law is ſomewhat different.

A baſtard, is one born out of wedlock, or before matrimony, or born ſo long after the death of the huſband, that it cannot be ſuppoſed to be begotten by him; but, this being a matter of ſome uncertainty; where a widow is ſuſpected to feign herſelf with child, in order to bring in a ſuppoſititious heir to the eſtate; the preſumptive heir may have a writ to examine whether ſhe be with child or not, and if ſhe be, to keep her under reſtraint till delivered; but, if the widow be deemed not pregnant, the preſumptive heir ſhall be admitted to the inheritance, though liable to loſe it again, on the birth of a child, within forty weeks from the death of the huſband. If a man dies, and his widow ſoon after marries again, and the child be born in ſuch a ſpace of time, as that, by courſe of nature, it may be the child of either huſband; ſuch child may, when arrived at years of diſcretion, chuſe which of the fathers he pleaſes.

Even children born in wedlock may, in ſome circumſtances, be baſtards. As when the huſband is out of the kingdom, for above nine months; but generally, during the marriage, acceſs of the huſband is preſumed, unleſs the contrary be ſhewn. In a divorce, *a menſa et thoro*, if the wife produces any children, they are baſtards; but, in a voluntary ſeparation, the law ſuppoſes acceſs of the huſband, unleſs a negative be proved. So, alſo, if there appears any impoſſibility of procreation in the huſband, as if he be but eight years old, the iſſue of the wife is baſtardized. Likewiſe, in caſes of divorce *a vinculo matrimonii*.

The duty of parents to baſtard children, is chiefly that of maintenance. When a woman is brought to bed, or declares herſelf pregnant, and will, before a juſtice of peace, charge any perſon on oath, with having got her with child; ſuch perſon ſhall be taken up, and committed till he gives ſecurity to maintain the child, or appear at the next quarter ſeſſions, to diſpute and try the fact. But, if the woman dies, or is married before delivery, or miſcarries, or is proved not to have been pregnant, the perſon ſhall be diſcharged; otherwiſe, two juſtices, may charge the mother, or the reputed father, with the payment of money for the ſupport of the child: and, if ſuch reputed father or mother run away from the pariſh, the overſeers, by direction of two juſtices, may

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ſeize their rents and effects, if they have any, to bring up ſuch baſtard child. No woman, however, can be *compelled* to declare who is the father of the child, till one month after her delivery.

Baſtards are conſidered as having no father, nor can they inherit any thing. But a baſtard may acquire a ſirname, by reputation. Legitimate children, have their firſt ſettlement in their father's pariſh, but illegitimate children, in the pariſh where they are born. In caſes of fraud, indeed, as where a woman is paſſing from one pariſh to another, by order of juſtices, or comes to a pariſh, to which ſhe does not belong, begging, as a vagrant, and drops her baſtard there; in the firſt caſe, the child ſhall belong to the pariſh from which the mother was illegally removed; and, in the other, if the mother be apprehended for her vagrancy, to the mother's pariſh. Baſtards, born in any licenſed hoſpital, belong to the pariſh, to which the mother belongs.

Baſtards are heirs to no one, nor can they have any heirs, but of their own bodies: a baſtard may however be made legitimate, and capable of inheriting by act of parliament. If the iſſue, however, of a baſtard purchaſe land, and die without iſſue, though the land cannot deſcend to any heir on the part of the father, yet, to the heir on the part of the mother, (being no baſtard,) it may; ſo, if the baſtard was attainted. Conſidered in a civil light, a baſtard has no relation, but yet he cannot marry his mother, ſiſter, or the like.

IV. The laſt general private relation is, that of guardian and ward.

Of the ſeveral ſpecies of guardians, the firſt are guardians by nature, *viz.* the father, (and ſometimes the mother,) of the child; as where an eſtate is left to an infant, the father is the guardian, and muſt account to his child when he comes of age, for the profits; and, with reſpect to daughters, the father may, by will or deed, appoint a guardian to them while under the age of ſixteen, and if none be ſo appointed, the mother ſhall be guardian. There are alſo guardians for nurture, or bringing up the child, which are the father or mother, till the infant is fourteen years old; but, in the caſe of an orphan, the biſhop of the dioceſe uſually appoints a guardian to take care of him. There are alſo guardians in nonage, theſe take place only where the minor is entitled to ſome real eſtates in land, where guardianſhip devolves on the neareſt relation he has, to whom the inheritance cannot deſcend; as for example, on his uncle by the mother's ſide, if he inherits from his father, for ſuch uncle can never inherit

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this eſtate. Wiſely deſigned, that this guardian may have no intereſt in the death of his ward. Guardians in ſocage, continue only till the minor is fourteen, for then he may chuſe his own guardian, provided this guardian was not the appointment of his father, in which caſe, the guardian keeps his office till the ward is twenty-one.

The power and duty of a guardian and ward, are, for the time, juſt that of the father and child, with this difference only, that the guardian, when the ward comes of age, is bound to give him an account of all he has on his behalf done, and muſt make ſatisfaction for all loſſes, owing to his wilful default or negligence.

Let us now conſider the ward, who is ſaid to be a minor, or within age. The ages of male and female are different, for different purpoſes. A boy at twelve, may take the oath of allegiance; is at years of diſcretion at fourteen, and may conſent or not to marry, may chuſe his guardian, and if his diſcretion be proved, may diſpoſe of his perſonal eſtate by will; at ſeventeen, he may be an executor; and, at twenty-one is his own maſter. A girl, at the age of ſeven, may be betrothed or given in marriage; at nine, is entitled to her dower; is at years of maturity at twelve, and may conſent or not to marry, and, if proved of ſufficient diſcretion, may give away her perſonal eſtate by will; at fourteen, ſhe is of legal diſcretion, and may chooſe a guardian; at ſeventeen, may be executrix, and, at twenty-one, is her own miſtreſs. Full age in man and woman is twenty-one years, completed on the day preceding the birth-day.

A minor cannot be ſued, but under the protection and name of his guardian; but, he may ſue either in the name of his guardian, or any friend; nay, by means of ſuch friend, minors have filed bills in chancery againſt their guardians. In criminal caſes, a minor at fourteen, may be executed for any capital offence, but *cannot* under ſeven years of age. In civil matters, a minor loſes nothing for neglect in demanding his right. Minors cannot alienate their eſtates; but, minor-truſtees or mortgagees, may convey under the direction of the court of Chancery, the eſtates they hold, either in truſt or mortgage; and, though a minor can do no legal act, if patron of a living, he may preſent to the benefice when vacant. A minor, may alſo purchaſe lands, but, when of age, he may either agree or not to ſuch purchaſe, and his heirs, inheriting from him may do the ſame, if he dies a minor. A minor may bind himſelf apprentice for ſeven years, and may

appoint

appoint a guardian to his children. Though no contracts a minor makes are binding on him, yet he may bind himself to pay for neceſſaries and for his education.

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## Chap. Eleventh.

### OF BODIES CORPORATE.

HAVING conſidered the people as individuals, and treated of their perſonal rights, which die with them, we come next to thoſe rights that never die, but are called Corporations.

Corporate bodies are capable of retaining and defending any privileges granted them, which voluntary aſſociations could not. They are alſo capable of holding eſtates, which they could otherwiſe not, without endleſs conveyances, from one to another, as often as the poſſeſſions are changed. But, when a number of men are incorporated, both they and their ſucceſſors are conſidered as one and the ſame perſon. They have but one will, collected from the majority of the body, and this ſingle will eſtabliſhes rules and orders for the regulation of the whole.

Corporations are firſt either aggregate or ſole. The aggregate conſiſts of the union of many individuals; as, thoſe of towns, colleges, and chapters; ſole corporations conſiſt of one perſon only and his ſucceſſors, deſigned to give them perpetuity, which in their natural perſons they could not enjoy. The King, for example, is a ſole corporation; ſo is a biſhop; ſo are ſome deans; and ſo is every rector or vicar. The neceſſity of this meaſure or inſtitution, will appear in conſidering the rector of a pariſh. At the original endowment of pariſh-churches, the freehold of the church, glebe, &c. was veſted in the rector, by the bounty of the donor, with a deſign, that it ſhould be continued to his ſucceſſors. For was this freehold veſted in the natural perſon of the rector, it might deſcend to his heir, and be liable to his debts, or at beſt, the heir could only be compelled to convey this right to the ſucceeding rector. The law therefore has ordained, that though the man may die, the rector ſhall live on, by making him and his ſucceſſors, like the King, a corporation.

Among corporations are the following, the mayor and commonalty of a borough-town, trading companies, churchwardens, the College of Phyſicians, the Company of Surgeons, the Royal Society, the Univerſities, charitable foundations, hoſpitals,

hoſpitals, biſhops, deans, arch-deacons, rectors, vicars and chapters.

In the erection of any corporation, the King's conſent is abſolutely neceſſary. Thoſe which exiſt at Common Law, as the King, a biſhop, a rector, and ſome others, are ſuppoſed to have had the concurrence of former Kings. Corporations once erected, live by their names, by which names they perform their corporate offices.

Their powers and rights are, 1. To have perpetual ſucceſſion. 2. To ſue or be ſued, &c. by the corporate name. 3. To purchaſe lands and hold them. 4. To have a common ſeal, and, 5. To make bye-laws for their better government; which, if not contrary to the laws of the land, are binding upon that body-corporate; if contrary, the penalty is forty pounds.

All corporate bodies are bound to act up to the end and deſign for which they were founded and incorporated, and to keep them to this, the law has provided certain perſons to viſit, and correct ſuch abuſes. The King, is the viſitor of the archbiſhop; the archbiſhop, of the biſhops; the biſhops, of all deans and chapters, rectors and vicars, and all other ſpiritual foundations; and, in all lay-corporations, ſuch as hoſpitals, &c. the viſitors are the founders, their heir or aſſigns. The founder of moſt civil ones, ſuch as borough-towns, trading companies, &c. is the King, and he exerciſes this juriſdiction in the court of King's Bench, where all abuſes are enquired into and redreſſed. In charitable foundations, where the founder has appointed no viſitor, it is the office of the biſhop of the dioceſe. In caſes, where the viſitor is under temporary diſability, the court of King's Bench will interfere.

Any particular member of a corporation, may loſe his place in ſuch body corporate, by acting contrary to the laws of the land, or the laws of his ſociety, or he may reſign it. And the corporation itſelf may be diſſolved ſeveral ways. 1. By act of parliament. 2. By the natural death of all its members. 3. By a ſurrender of its franchiſes into the hands of the King. And, 4. By forfeiture of its charter. In caſe of the diſſolution of a body-corporate, its lands and tenements revert to him, (or his heirs,) who granted them, all its debts are extinguiſhed, and all its claims ceaſe.

# BOOK II.

## *On the Rights of Things.*

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### Chap. First.

### OF REAL PROPERTY.

HAVING treated of ſuch rights as are annexed to the perſons of men, we proceed to ſuch as may be called their property.

Objects of property are things, either real or perſonal: real, are ſuch as are in their own nature immoveable; as lands and tenements; perſonal, ſuch as may be moved; for example, goods, money, &c.

There are two ſorts of real property; lands, and hereditaments. Land is what every one knows: hereditaments imply, not only houſes and other buildings, but, every thing that may be inherited. Thus it is applicable, not only to lands and houſes, but to offices, rents, commons, advowſons, franchiſes, peerage, or other property of the like unſubſtantial kind.

Hereditaments then, are either corporeal or incorporeal. Corporeal are ſuch as may be ſeen or felt; incorporeal, ſuch only as exiſt in idea.

Corporeal hereditaments, imply ſubſtantial and permanent objects, which may be comprized under the word Land, ſuch as arable grounds, meadows, paſtures, woods, moors, waters covering land, marſhes, and heath; alſo houſes, and other buildings, which is land built upon: ſo, that conveying land or ground, we naturally convey with it any building ſtanding upon ſuch land.

Under the idea of land, is comprized the ſpace above and below it, that ſpace in a direct line above aſcending to the clouds,

clouds, ſo that none may erect a building to overhang another's ground; and, that ſpace underground, in a direct line towards the centre of the earth. Mines, for example, go with the property of the ſurface; ſo, that the word Land includes, not only the ſurface of the earth, but every thing above it and below it.

An incorporeal hereditament, is a right, iſſuing out of a corporeal one, and are chiefly ten. Advowſons, tithes, commons, ways, offices, dignities, franchiſes, penſions, annuities, and rents.

1. An advowſon, is the right of preſentation to a living; he who has the advowſon, is called the patron. For lords of manors, who built churches on their eſtates, and endowed them with land, tithes, &c. had the privilege of nominating whom they pleaſed, to be miniſter of ſuch church, provided he was canonically qualified, which the biſhop of the dioceſe was to enquire into.

There are a kind of advowſons. called Donatives, where the King hath licenſed any perſon to build a church or chapel, and ordains, that it ſhall be in the gift of the patron without preſentation, inſtitution, or induction. In which caſe, it is ſubject only to the patron's viſitation. But ſhould the patron once wave this privilege of donation and preſent to the biſhop, and the perſon preſented be admitted and inſtituted; the advowſon, will be ever after preſentative and not donative.

2. The next kind of incorporeal hereditaments, are tithes; which, are the tenth part of the produce of lands, the liveſtock feeding and growing there, and the perſonal induſtry of the inhabitants. There are three ſpecies of tithes, *viz.* predial, mixed, and perſonal. 1. *Predial* tithes are corn, graſs, hops, and wood. 2. *Mixed*, are wool, milk, pigs, &c. being natural products, nurtured by care. 3. *Perſonal* tithes, are thoſe ariſing from trades, fiſheries, and the like, of which, only a tenth part of the clear gains is due.

Tithes are to be paid for every thing that yields an annual increaſe, as a profit to the owner; ſuch as grain, hay, fruit, cattle, poultry, &c. but not for ſtone, lime, chalk, and other ſubſtances of the earth.

But there are exemptions from paying tithes, by compoſition and cuſtom. Where perſons are exempted by compoſition, it is by an agreement, between the owner of the lands and the miniſter, with the conſent both of patron and ordinary, that ſuch lands ſhall be exempted from paying tithes on account of a certain adequate ſatisfaction made in lieu,

lieu of them: but, no compoſition, made ſince the thirteenth of Elizabeth, is valid, for a longer term than three lives, or twenty-one years, an act being paſſed at that time, to prevent it.

Exemption by cuſtom, is where certain lands have been wholly or partially diſcharged, time out of mind, which is called a *modus*.

Some are exempt from paying any tithes at all, as is the King, by his prerogative. A vicar pays no tithes to the rector, nor a rector to the vicar; but, theſe exemptions are confined to the King and the clergy: for their tenant or leſſee ſhall pay tithes, though the lands could not be titheable in their own hands. Some monaſteries have alſo been diſcharged from paying tithes; and, thoſe lands that are now tithe-free have become ſo, by having ſuch abbey lands.

3. Right of common is another incorporeal hereditament; being a right one man has in the land of another, ſuch as to feed his cattle, catch fiſh, dig turf, cut wood, &c.

The ſoil of thoſe waſte grounds called Commons, is the property of the lord of the manor, as in common fields it belongs to particular tenants: for, when lords of manors granted out parcels of lands to tenants, they gave ſuch tenants a right to feed their cattle upon the waſtes. Where the commons of two diſtinct manors join, ſo that the cattle on one ſhall ſtray upon the other, it is a mutual treſpaſs that cannot well be avoided, unleſs ſuch commons were divided, and therefore the law winks at it. Such right of common is generally limited as to number and time; but, there are commons without ſtint, open to the tenant all the year. The lord of the manor, however, may encloſe as much of the waſte for tillage or wood-ground, as he pleaſes, provided he leaves ſufficient common for thoſe who are entitled to it. No one but the lord has any intereſt in the ſoil; but, in the common, the intereſt both of lord and commoner is mutual. They may both bring actions, either againſt ſtrangers or each other; the lord for the public damage, and each commoner for his private loſs.

There is in ſome places alſo a liberty of fiſhing in certain waters, and in others, a liberty for digging turf in certain waſtes. There is alſo a common for digging coals, minerals, ſtones, and the like.

Further; there is a liberty in ſome places of taking neceſſary wood from another's eſtate, for the uſe of a houſe, or implements of a farm. This is called eſtovers or houſe-bote, plough-bote, and cart-bote. The firſt is a ſufficient allowance of wood, to repair houſes, and for fire; the laſt two, for wood

for

for making and repairing implements of huſbandry. Theſe botes any tenant may take off the land without leave, unleſs he be reſtrained by ſpecial covenant.

4. Ways, or the right of going over another man's ground, is a further ſpecies of incorporeal hereditaments. The King's highways, and ways from villages are not here meant, but private ways; which may ariſe from grant or cuſtom; or, an impoſſibility of getting to a piece of ground granted, any other way.

5. A right to exerciſe any public or private office, and to take the fees, is a fifth ſpecies of incorporeal hereditaments. A perſon may have an eſtate in ſuch office, or a term of years.

6. Dignities are a ſixth ſpecies, but of theſe we have treated.

7. Franchiſes are a ſeventh. Theſe are royal privileges, branches of the King's prerogative, granted to the ſubject by the crown.

To be a county palatine, is a franchiſe; to be incorporated, is another. Court-leets, manors, lordſhips, to have waifs, wrecks, &c. to have a court of one's own, and a liberty of trying cauſes; to have a fair or market, with the right of taking toll there, or at other places, as at bridges, wharfs; to have a foreſt, chaſe, park, warren, fiſhery: theſe are all franchiſes.

8. Annuities are an eighth ſpecies: being a yearly ſum chargeable upon the perſon of the grantor, and which the grantor is anſwerable for as long as he lives; no act of bankruptcy or inſolvency being able to diſcharge him.

9. Rents are the laſt ſpecies of incorporeal hereditaments, being certain profits annually iſſuing out of lands and tenements, corporeal.

If no particular place be named in the reſervation, all rent is payable upon the land from whence it iſſues, except rents to the King, which muſt be paid at the Exchequer, or to his country receiver; and, rent is demandable and payable, before ſun-ſet of the day it is made payable on.

## Chap. Second.

### OF TENURES.

ALMOST all the real property of this kingdom is, ſuppoſed to be granted, by ſome ſuperior lord, in conſideration of certain ſervices, to be rendered to the lord, by the tenant

tenant or poſſeſſor of this property. The land holden, is called a *tenement*, the holder a *tenant*, and the manner of holding, a *tenure*.

The free lands of this kingdom, are now held by ſocage, which is a tenure, by any certain and determinate ſervice: as to hold lands by fealty, and twenty ſhillings rent; or, by homage, fealty, and twenty ſhillings rent; or, by homage and fealty, without rent; or, by fealty and certain perſonal ſervices, ſuch as ploughing the lord's land for three days; or, by fealty only. All theſe are tenures in ſocage, which, in its original ſignification, implies free tenure.

But there is a kind of tenure among us, called *Copyhold*, which leads us to ſay ſomething of manors.

A manor was formerly a barony, and conſiſted of a certain diſtrict of land, the uſual reſidence of the owner, ſome part of which he kept in his own hands, for the uſe of his family; the reſt was diſtributed among his tenants, under two different modes of tenure. Some were held by deed, under certain rents and fee-ſervices, and ſome without any writings, were allotted to the common people, at the will of the lord, and reſumed at his diſcretion; the reſidue, being uncultivated, was called the lord's waſte, and ſerved for public roads, and for common paſture for the lord and his tenants. Each lord of a manor is empowered to hold a court-baron for redreſſing miſdemeſnors and nuſances within his manor, and for ſettling diſputes of property among his tenants. And this court is ſo eſſential a part of every manor, that if not attended by by two tenants, the manor is loſt.

Such of the King's greater barons, as held a large extent of territory under the crown, frequently granted out ſmaller manors, to be held under them. Such extent of territory, comprizing ſundry manors, is called an *Honour*, and the lord is called *Lord paramount*.

Thoſe lands that were held by deed, under certain rents and fee-ſervices, differed nothing from free ſocage lands; but thoſe that were allotted to the common people, at the pleaſure of the lord, were, like eſtates, held formerly in villenage, whereby the holder was bound, to do whatſoever his lord commanded him. Certain indulgencies of lords, certain conſtructions of the law, and certain incroachments of the tenants, have, however, ſince altered the nature of this tenure, and though ſuch tenants are ſtill to hold their eſtates, at the will of the lord, yet it is ſuch a will, as is agreeable to the cuſtom of the manor; which cuſtoms are preſerved by

by the rolls of courts baron, or the conſtant uſage of the manor. And thoſe tenants, who have nothing to ſhew for their eſtates but admiſſions in purſuance of theſe cuſtoms, witneſſed by copies of entries in their poſſeſſion, made by the ſtewards of courts-baron, are called *Tenants by copy of court-roll*, and their eſtates is thence called a *Copyhold*. Their ſervices are now uſually commuted for a ſmall pecuniary quit-rent.

The appendages of a copyhold tenure, beſides thoſe in common with free tenures, are heriots, wardſhips, and fines. Heriots are a tribute of the beſt beaſt the tenant poſſeſſed, or other moveable goods (as the cuſtom may be) to the lord, on the death of the tenant, a manifeſt relict of villein tenure, nor was this to be conſidered as a hardſhip, as all the tenant's goods and chattels were in fact the property of the lord, and he might have ſeized the ſame at any time.

With reſpect to wardſhip, the lord is the legal guardian, and he uſually aſſigns ſome relation of the minor-tenant to act for him. Of fines, ſome are due on the death of each tenant; and others are mere fines, paid for alienation of lands. In ſome manors only one of theſe ſorts can be demanded, in ſome both, and in others, neither. Sometimes they are fixed by cuſtom, and ſometimes are arbitrary, at the will of the lord; but even when arbitrary the courts of law have tied them down to be reaſonable. In ſhort, no fine can now be demanded, (unleſs in particular circumſtances) of more than two years improved value of the eſtate.

The next object of enquiry is the nature of freehold eſtates which may be divided into thoſe of *inheritance*, and thoſe *not of inheritance*.

1. Freeholds of inheritance, are where the poſſeſſor, or the tenant in fee-ſimple, holds lands and hereditaments, to him and his heirs for ever.

2. Freeholds not of inheritance, are for life only; for example, where a leaſe is granted to a man to hold for his own life, that of any other perſon, or for more lives than one; or where ſuch an eſtate falls to a man by the operation of law; in all which caſes, he is ſtiled a tenant for life.

The emoluments of a life-eſtate are principally the following:

1 Every tenant for life, unleſs reſtrained by agreement, may cut wood for firing, and implements of huſbandry, but he may not fell timber, or do other waſte upon the premiſes.

2. Neither he nor his repreſentatives ſhall be prejudiced by

any ſudden determination of his eſtate. Thus, if a tenant for life ſows his land and dies before harveſt, his executors ſhall have the crop. So, if a leaſe be made to huſband and wife, during coverture, or the time they continue ſo, and the huſband ſows the land, and a divorce takes place before the harveſt, the huſband ſhall have the crop. In like manner, all perſons preſented to any eccleſiaſtical benefice, or any civil office, are conſidered as tenants for their own lives, unleſs the contrary be expreſſed in the form of donation.

3. A third emolument relates to leſſees; for, they have not only the ſame, but greater indulgencies than their leſſors, the original tenants for life; for in caſes, where a tenant for life ſhall not have the profits of his labour, owing to the eſtate's expiring from ſome act of his own; this exception ſhall not reach his leſſee or under-tenant. As where a woman holds an eſtate during her widowhood; if ſhe marries, ſhe loſes the eſtate; but, this act of hers ſhall not deprive her tenant of the crop, when ſuch tenant has ſown the land.

A freehold for life, happening by operation of law, is of three kinds: *viz.* 1. That of tenant in tail after poſſibility of iſſue extinct. 2. That of tenant by the curteſy of England; and, 3. that of tenant in dower.

1. A tenant in tail after a poſſibility of iſſue extinct is, where a perſon, to whom, and to whoſe heirs by his preſent wife, (ſuppoſe Mary,) an eſtate is granted, ſhould, loſing his wife, and having no children living by her, become tenant for life, to that eſtate; for in this caſe the eſtate cannot deſcend to any one. Such an eſtate muſt be created by the act of God, ariſing from the death of that woman, out of whoſe body the iſſue was to ſpring. A perſon enjoying an eſtate in this manner, is not puniſhable for waſte, &c.

2. A tenant by the curteſy of England, is a man who marries a woman poſſeſſed of an eſtate of inheritance, who has, by her, iſſue born alive, and capable of inheriting her eſtate. In this caſe he ſhall, on the death of his wife, hold the lands for his life. But their are four requiſites neceſſary to make this claim good. 1. The marriage muſt be legal. 2. The wife muſt have been in actual poſſeſſion of the eſtate; except in the caſe of ſome incorporeal hereditaments; ſuch as the advowſon of a church, which did not become vacant during the wife's life. 3. The iſſue muſt be born alive, and during the life of the mother. 4. The laſt requiſite is the death of the wife, before which the huſband has not a complete

plete claim to the eſtate, though he may before do many acts to charge the lands.

3. Tenant in dower, is where the wife ſhall have, for her natural life, a third part of all the lands and tenements which her huſband poſſeſſed during the coverture.

In order to have her thirds, ſhe muſt be the wife of the party at the time of his death. If ſhe be divorced *a vinculo matrimonii*, ſhe cannot have her dower, but a divorce *menſa et thoro*, only, does not deſtroy it. Yet now, if a woman elopes from her huſband, and lives with an adulterer, ſhe loſes her dower, unleſs her huſband be voluntarily reconciled to her.

A widow, by law, is entitled to a third part of all lands and hereditaments her huſband poſſeſſed, eſtate or real effects, and of all reverſionary eſtates to which he was entitled; in ſhort, of any thing, of which any child ſhe might have had, might poſſibly have been heir. Nay, if a man alienates his land during the life of his wife, and ſhe not divorced; when a widow, ſhe is entitled to the thirds of ſuch alienated lands, for he parts with them liable to dower. Copyholds are not liable to dower, being eſtates only at the will of the lord, unleſs it be by the ſpecial cuſtom of a manor.

A jointure is a joint eſtate, ſtrictly ſpeaking, limited to both huſband and wife, or a ſole eſtate limited to the wife after the death of the huſband, which being made to her before marriage, precludes her for ever, from her dower. But then theſe four requiſites muſt be punctually attended to. 1. The jointure muſt take place immediately on the huſband's death. 2. It muſt not be for a ſhorter term than her own life. 3. It muſt be made to herſelf alone; and. 4. It muſt be particularly expreſſed in the deed of conveyance, that ſuch jointure is in ſatisfaction of her whole dower. If this jointure be made after marriage, ſhe can chooſe, after the death of her huſband, whether ſhe will accept of the jointure, or her dower. And if by any fraud or accident, the jointure proves to be on a bad title, and the widow is turned out of poſſeſſion, ſhe may claim her dower.

## Chap. Third.

### OF TITLES TO ESTATES.

WE come now to the titles by which eſtates are claimed; and, theſe may be acquired two ways, by *deſcent* and *purchaſe*.

I. Deſcent, or inheritance, is that claim or title whereby a man acquires his eſtate on the death of his anceſtor, as his heir at law; the following rules of inheritance are laid down in law.

1. Inheritances ſhall lineally deſcend to the iſſue of the perſon laſt actually in poſſeſſion, *in infinitum*; but ſhall never lineally aſcend.

The perſon next in the line of ſucceſſion is either called the *heir-apparent*, or *heir-preſumptive*; the heir-apparent is he, who, if he outlives his anceſtor, has an indeaſeaſible right of inheritance, as the eldeſt ſon or his iſſue; the heir-preſumptive is he, who, if his anceſtor ſhould die immediately, ſhould be his heir, as a brother or nephew; but whoſe preſumptive ſucceſſion might be deſtroyed by the birth of a child. For example, if my elder brother has no ſon, my eldeſt ſon will enjoy his grandfather's title or eſtate; but ſhould he have a ſon, it will cut him off. Nay, even ſuppoſing my ſon ſhould inherit after the death of my father and my brother; ſhould my brother leave his wife with child, ſuch poſthumous child, when born, ſhall deprive my ſon of the title or eſtate he had taken poſſeſſion off. But it muſt be remembered, that no one can inherit by virtue of his anceſtor, unleſs ſuch anceſtor was in actual poſſeſſion of the eſtate.

2. The male iſſue ſhall be admitted before the female.

Thus ſons ſhall inherit before daughters; but, daughters ſhall ſucceed before any collateral relations.

3. Where there are two or more males in equal degree, the eldeſt only ſhall inherit; but, the females altogether.

Thus, where a man leaves two ſons, John and Thomas, and two daughters, Mary and Elizabeth; John, his eldeſt ſon, ſhall inherit ſolely: if John dies without iſſue, Thomas ſhall ſolely ſucceed; and if Thomas dies alſo without iſſue, the daughters ſhall inherit together, as co-heireſſes or co-parceners.

4. The lineal deſcendants *in infinitum* of any one deceaſed, ſhall inherit as their father or anceſtor would have done before them.

Thus, the child, grandchild, or great grandchild, (either male or female,) of the eldeſt ſon, ſucceeds before the younger ſon, and ſo on. If there be two ſiſters, Mary and Elizabeth, and Mary dies, leaving four daughters, and after this the father of Mary and Elizabeth dies, leaving no other children; in this caſe, his eſtate ſhall be divided into two parts, of which Elizabeth ſhall take one part, and the four daughters of Mary ſhall take the other, as the repreſentatives of their mother. A

ſimilar diviſion would take place, if an eſtate fell to the iſſue of a man's three ſiſters, one of which ſiſters left three children, one two, and the other one; for in this caſe, the eſtate would be divided into three parts, and one-third would be the property of the three children of one ſiſter; one-third the property of the two children of the ſecond ſiſter, and one-third the property of the child of the other ſiſter. So again, if a man dies, leaving three daughters, *A*, *B*, and *C*, and *A* dies, leaving two ſons; *B* leaving two daughters, and *C* leaving a daughter and a ſon; the eldeſt ſon of *A* ſhall inherit one-third of the eſtate, in excluſion of his younger brother; the two daughters of *B*, another third, as coparceners, and the ſon of *C*, the remaining third, in excluſion of his eldeſt ſiſter; becauſe, the eldeſt ſon inherits before the younger, the ſon before the daughter, but the daughters in coparcenary.

5. On failure of lineal iſſue, of the perſon laſt in poſſeſſion, the inheritance ſhall deſcend to the blood of the firſt purchaſor, ſubject to the three preceding rules or maxims.

By the firſt purchaſor is underſtood, he who firſt acquired the eſtate to his family, no matter how he came by it, ſo as he did not obtain it by deſcent.

II. The other way by which titles may be acquired, is by purchaſe.

Purchaſe here implies *perquiſitio*; denoting any means of acquiring an eſtate, out of the common courſe of inheritance. If I give land freely to another, he is in the eye of the law, a purchaſor; for he obtains that land by his own agreement, that is, by conſenting to the gift. If my father's eſtate be entailed upon me, before I am born; when I am in poſſeſſion of that eſtate, I am deemed in law, a purchaſor; for I take quite another eſtate than the law of deſcents would have given me. Nay, where an anceſtor bequeaths his eſtate to his heir at law, with any other limitations than the courſe of deſcents would direct, ſuch heir takes by purchaſe: but if a man, poſſeſſed of a freehold, leaves his whole eſtate to his heir at law, ſo that the heir takes neither a greater nor a leſs eſtate by the deviſe, than he would have done without it: he is deemed to have taken it by deſcent, though ſuch freehold be charged with incumbrances for the benefit of creditors and others.

Now an eſtate acquired by ſuch purchaſe, is deſcendible to the puchaſor's blood in general, and not confined to the heirs by the father's or mother's ſide; but, deſcends to the heirs general, firſt of the father's ſide, and upon failure of iſſue here, to the mother's ſide. An eſtate alſo enjoyed by purchaſe

will not make the heir reſponſible for the acts of the anceſtor, as is the caſe in eſtates by deſcent. For, if the anceſtor by any deed, ſhould bind himſelf and his heirs, ſuch deed ſhall be only binding on the heir, and ſo far only, as he had any eſtate of inheritance veſted in him, (or in ſome perſon in truſt for him) by deſcent from that anceſtor, ſufficient to anſwer the charge; whether he remains in poſſeſſion, or hath alienated it before an action be brought; which ſufficient eſtate is called *aſſets*. If a man therefore covenants for himſelf and his heirs, to keep my houſe in repair, I can then, (and then only,) compel his heir to repair the premiſes, when he has aſſets or eſtate ſufficient by deſcent from the covenantor, to anſwer the purpoſe; for though the covenant deſcends to the heir, whether he inherits any eſtates or not, it lies dormant, and is not compulſory, till he has aſſets by deſcent.

Purchaſe under this ſignification, includes the following methods of acquiring a title to eſtates. 1. Eſcheat. 2. Occupancy. 3. Preſcription. 4. Forfeiture. And, 5. Alienation.

I. Eſcheat, is that of an eſtate's reverting, for want of an heir, to the lord of the fee, by whom it was originally given; the doctrine of eſcheats, being founded on this principle, that the blood of the perſon who laſt poſſeſſed the fee-ſimple of the eſtate, is by ſome means or other, utterly extinct and gone. This is the caſe, if the laſt holder dies without heirs; or, if his blood be attainted, for an attainder extinguiſhes blood. Let us ſee then how hereditary blood may fail.

1. Hereditable blood is wanting, when the eſtate-holder dies, without any relations on the part of any of his anceſtors.

2. When he leaves no relations deſcending from thoſe anceſtors, from which his eſtate deſcended.

3. When he leaves no relations of the whole blood.

4. A monſter, without human ſhape, although born in wedlock, cannot be heir to any land; of courſe, ſuch a birth will not entitle the huſband to be tenant by the curteſy.

5. Baſtards alſo have no hereditable blood; nor have they any legal anceſtors; of courſe, no legal collateral kindred, nor any legal heirs, but ſuch a claim by a lineal deſcent from them. A baſtard, therefore, purchaſing land and dying poſſeſſed thereof, inteſtate, without iſſue, the land ſhall eſchea to the lord of the fee. There is one determination in law, however, favourable to baſtards, which is, when a man has a baſtard ſon, and afterwards marries the mother, and by her has a legitimate

a legitimate ſon, and then dies, and the baſtard ſon enters upon his eſtate, and enjoys it uninterrupted to his death, whereby the baſtard's iſſue becomes poſſeſſed thereof; neither his legitimate ſon, nor any other perſon, can claim that eſtate afterwards; for the law will not ſuffer the matter to be unravelled after the death of ſuch baſtard. The right heir ſhould have ejected him when alive.

6. Neither are aliens allowed to have any heritable blood; of courſe, no relations that are foreigners, can inherit by deſcent. If an alien be made a denizen, and ſhould then purchaſe an eſtate, his ſon, born before he became a denizen, cannot inherit that eſtate; but, a ſon, born afterwards may. Should ſuch alien, however, have been naturalized by act of parliament, ſuch eldeſt ſon might then have inherited. But all natural-born ſubjects of the King, may inherit by deſcent, from any of their anceſtors, lineal or collateral; although their father or mother, or other anceſtor, from whom they derive their pedigrees, were born out of the King's allegiance; provided that no right of inheritance ſhall accrue to any perſon whatſoever, unleſs they are in being, and capable to take as heirs at the death of the perſon laſt ſeized; excepting, however, in the caſe where lands ſhall deſcend to the daughter of an alien; which deſcent ſhall be diverted in favour of an afterborn brother, or the inheritance ſhall be divided with an afterborn ſiſter or ſiſters, according to the uſual rule of deſcents by Common Law.

7. The blood of a perſon attainted for felony, is ſo corrupted in the eye of the law, as not to be allowed any longer inheritable; of courſe any fee ſimple the felon poſſeſſed would eſcheat to the lord of the fee, if forfeiture to the King did not intercept it in its paſſage: in caſes of treaſon, it does for ever; in other felonies, for a year and a day only, after which, it eſcheats to the lord. In conſequence of this doctrine, all eſtates of inheritance eſcheating to the lord, the widow of the felon was liable to loſe her dower, till it was enacted, That though any perſon be attainted of miſpriſion of treaſon, murder, or felony, yet his wife ſhall enjoy her dower. But where the law of forfeiture takes place, as it does in treaſon, ſhe cannot be endowed.

Eſcheat in the caſe of attainder, goes ſtill farther; for, the blood of the tenant being utterly extinguiſhed, he not only loſes all that he hath, but is incapable of inheriting any thing for the future; for ſhould his father die, poſſeſſed of an eſtate, that eſtate ſhall eſcheat to the lord, becauſe the ſon being attainted,

tainted, is incapable to inherit, and there can be no other heirs during the ſon's life, and if he was attainted even for treaſon it eſcheats to the lord, for no forfeiture take place to the King, unleſs the felon had been in poſſeſſion. But, in ſuch a felony, where the ſtatute expreſſes that it ſhall not extend to corruption of blood, the eſtate of the felon ſhall not eſcheat to the lord, but the profits of it ſhall be forfeited to the King, while the offender lives.

Nay, the perſon ſo attainted is not only incapable of inheriting himſelf, but no eſtate can paſs through him to his poſterity: his ſons for example, can neither inherit his eſtate, nor the eſtate of his father, their grandfather, nor any other anceſtor on his part, by virtue of any claim he might have had. Where a man is even attainted and pardoned by the King, his ſon can never inherit either from him or from his anceſtors, through him; unleſs ſuch ſon be born after the pardon; for the pardon makes the father a new man; but if ſuch ſon, born after the pardon, be a ſecond ſon, having an elder brother born before the pardon; ſuch ſecond ſon cannot inherit while his elder brother be living, but the eſtate ſhall eſcheat to the lord. Further, where a man hath two ſons, *A* and *B*, and *A* the elder, in the life-time of his father, marries and hath iſſue, and then is attainted and executed, and afterwards the father dies, the eſtate of the father ſhall not even deſcend to *B*; for the iſſue of *A*, which once had a poſſibility to inherit, ſhall bar the deſcent to *B*, and the eſtate ſhall eſcheat to the lord. To prevent this hardſhip to guiltleſs children, almoſt every act of parliament ſince Hen. VIII. creating felonies, declares that they ſhall not extend to any corruption of blood. But it muſt be remembered, that no eſtates eſcheat, but entire fees-ſimple.

II. Occupancy is another claim to lands under the title of purchaſe; which is, taking poſſeſſion of things which before belonged to no one.

The right of occupancy, ſo far as it relates to eſtates, is confined to one ſingle inſtance, *viz.* where a man has lands granted to himſelf only, not his heirs, for the life of another perſon, and dies during that life, by which he held them. In this caſe, he that could firſt enter on the eſtate, might lawfully retain poſſeſſion during that life, by which the deceaſed perſon held it, unleſs the reverſion of ſuch eſtate was in the crown. But it is now enacted, that the tenant for the life of another may deviſe it by will, or it ſhall go to the executors or adminiſtrators, and be aſſets in their hands for payment of debts; alſo that the ſurplus of ſuch eſtate for another man's life, after payment of debts, ſhall go in a courſe of diſtribution, like a chattel intereſt.

In other caſes where a landholder dies inteſtate, and no heir or owner can be found, the law gives the eſtate to the King, or to the lord of the fee.

If an iſland ariſes in the middle of a river, it belongs to the owner of the iſland on that ſide, to which the ſaid iſland is neareſt; but if an iſland ariſes in any ſea belonging to the crown of England, it is the property of the King. New land on the coaſt, occaſioned by waſhing up of ſand or earth, or by the ſea's retiring, provided ſuch new land is acquired by ſmall degrees, belongs to the owner of the land adjoining; but ſhould ſuch new land appear ſuddenly, it belongs to the King. Where a river, running between two lordſhips, by degrees gains upon one leaving the other; the owner, loſing his grounds thus gradually, has no remedy; but ſhould the courſe of the river be ſuddenly changed, the man who thereby loſes his ground ſhall have, as a recompence, what the river has left in another place.

III. Preſcription is a third method of acquiring real property under the denomination of purchaſe; that of being able to ſhew no other title to what we claim, then that it has been in our family, time immemorial; but to make this title good, our anceſtors muſt have poſſeſſed the right within the ſpace of ſixty years of the time that we claim it.

1. Nothing, however, but incorporeal hereditaments, ſuch as a right of paſſage, common, &c. can be claimed by preſcription. 2. Nor can any landholder claim under this title, but a tenant in fee; that is, no copyholder no tenant for life, for years, or at will. If a copyholder does it, it muſt be under cover of his lord's eſtate; if a tenant for life, under cover of the tenant in fee-ſimple. 3, Every preſcription ſuppoſes a grant to have exiſted; of courſe, the lord of a manor cannot claim a right of raiſing a tax or toll upon ſtrangers, becauſe no grant could authorize ſuch a claim. 4. Neither can what is to ariſe by matter of record be preſcribed for, it muſt be claimed by grant, entered on record; ſuch as the royal franchiſes of deodands, felon's goods, and the like. Theſe not being forfeited, till the matter on which they ariſe is found by jury, and thus made a matter of record, the forfeiture itſelf cannot be claimed by any inferior title. But treaſure-trove, waifs, eſtrays, &c. may be claimed by preſcription, for theſe ariſe not from any matter of record. 5. If a man claims a right in himſelf and thoſe whoſe eſtate he holds, nothing is claimable by this preſcription, but ſuch things as are incident, or appendant to lands; for example, that he, or thoſe whoſe manor he holds, held ſuch a certain

a certain advowſon as *appendant* to that manor: but if the advowſon be diſtinct inheritance, not appendant, and he meant to claim it, he muſt do it in the name of himſelf and his anceſtors.

Eſtates gained by preſcription, are not, like other purchaſes, deſcendible to the heirs in general. If a man preſcribes for a right of a paſſage through any ground as a right in himſelf and his anceſtors, it will deſcend only to the blood of that line of anceſtors in whoſe name he ſo claims; but if he claims in right of himſelf, and thoſe whoſe eſtate he holds, it will deſcend in the ſame manner as the eſtate deſcends, whether it was acquired by deſcent or purchaſe.

IV. A fourth method of acquiring real property by purchaſe is forfeiture. Now lands may be forfeited in various degrees, and by various means; as, 1. By crimes and miſdemeſnors. 2. By alienation, contrary to law. 3. By lapſe. 4. By ſimony. 5. By non-performance of covenants. 6. By waſte. 7. By breach of copyhold cuſtoms; and, 8. By bankruptcy.

1. We ſhall have occaſion to ſpeak more fully hereafter of forfeiture for crimes and miſdemeſnors; at preſent, I ſhall only mention the offences that incur a forfeiture of lands and hereditaments. Theſe are, treaſon; felony; miſpriſion of treaſon; *præmunire*: drawing a weapon on a judge or ſtriking any one in the preſence of the King's principal courts of juſtice.

2. They may be forfeited alſo by alienation, or conveying them to another contrary to law.

1ſt. Alienation of lands or hereditaments to any corporation, is contrary to law, and called alienation in *mortmain*: religious houſes in this way became proprietors of eſtates, which were perpetually inherent in one *dead hand*. To prevent this, many ſtatutes from time to time have been paſſed: but a man may beſtow lands for the maintenance of a ſchool, an hoſpital, or other *charitable* purpoſes: to prevent, however, perſons on their death-beds from making large and improvident legacies, even for theſe good purpoſes, which was the deſign of the ſeveral mortmain laws; it is enacted that no lands or tenements, (that is hereditaments,) or money to be laid out thereon, ſhall be given for any *charitable* uſes whatſoever, unleſs, by deed, executed in the preſence of two witneſſes twelve calendar months before the death of the donor, and enrolled in the court of Chancery, within ſix months after its execution, (except ſtocks in the public funds, which may be transferred within ſix months previous to the donor's death, (and unleſs ſuch gift be made to take effect immediately, and be without power of revocation; and, that all other gifts ſhall be void. The univerſities of Oxford

ford and Cambridge, their colleges, and the foundations of Eton, Wincheſter, and Weſtminſter, are excepted out of this act; provided that no college purchaſe more advowſons than are equal in number to half the fellows on the reſpective foundations.

2dly. Alienation of lands and tenements to an alien, incurs a forfeiture of the ſame to the crown.

3dly. Alienation by tenants of eſtates for life or a certain time, incurs alſo a forfeiture of ſuch eſtates to thoſe whoſe right is attacked thereby, when ſuch tenants ſhall preſume to convey the eſtates they hold, in a greater manner than the law entitles them to do. For example, if a tenant for his own life, conveys away his eſtate, for the life of another, or in tail, or in fee, he does what he is not empowered to do; theſe being eſtates which either muſt or may laſt longer than his own life: the puniſhment for which is, a forfeiture of his own term in the eſtate to him who has the reverſion after him.

Equal both in it's nature and conſequences to this illegal alienation, is that crime which the law calls a *diſclaimer*, where a tenant, holding lands of any lord, neglects to render him the due ſervices, and upon an action brought to recover them, diſclaims to hold of his lord. So alſo, if, in any court of law, a tenant for his own life, claims any greater eſtate than was granted him, or takes upon himſelf thoſe rights which belongs to tenants of a ſuperior claſs: if he aſſerts the reverſion to be in a ſtranger, by accepting his fine, attorning as his tenant, (that is, acknowledging himſelf to be his tenant;) by any colluſive pleading, or the like, ſuch behaviour incurs a forfeiture, of his eſtate.

3. Lapſe is a kind of forfeiture, whereby the right of preſentation to a benefice falls to the dioceſan, if the patron neglects to preſent in time; to the archbiſhop of the province, if the biſhop neglects; and to the King, if the archbiſhop neglects. That the church may not remain long unprovided, the law inſtituted this lapſe to quicken the patron. Where there is no right of inſtitution, there is no lapſe; of courſe, no donative can lapſe, unleſs it has been augmented by the Queen's bounty; nor can any living lapſe, the preſentation of which is originally in the crown.

Six calender months, excluſive of the day of avoidance, is the term in which the right to preſent by lapſe accrues from one to the other ſucceſſively. Where the dioceſan is patron, he ſhall only have one ſix months to collate or fill the church in. If the biſhop does not collate his own clerk immediately, and the patron ſhould preſent, though after the expiration of his ſix months, the

the biſhop is bound to inſtitute the clerk whom the patron preſents. If the biſhop ſuffers the preſentation to lapſe to the archbiſhop, the patron has alſo the ſame advantage, if he preſent before the archbiſhop has filled the living; but the biſhop has no ſuch privilege in prejudice to the archbiſhop: but ſhould the preſentation lapſe to the King, the patron loſes this advantage. Leſt the King, however, ſhould keep the church void, the patron may preſent; but even after inſtitution, the King, by preſenting another, may turn out the patron's clerk, or, after induction, may remove him.

Where a living becomes void by death, or ceſſion through plurality of livings, the patron is bound to take notice of the avoidance, at his own peril: but, in caſe of vacancy by reſignation, deprivation, or the clerk's being refuſed for inſufficiency, the law obliges the biſhop to give the patron notice, theſe matters being ſuppoſed to reſt with the ordinary, or no lapſe will take place; nor yet, if a biſhop refuſes or neglects to examine and admit the patron's clerk, without good reaſon aſſigned, or notice given; nor, where the right of preſentation be conteſted, till the queſtion of right be decided.

4. Simony is the preſentation of any one to an eccleſiaſtical benefice for money, or reward, the penalty of which is a forfeiture of the right of preſentation for that turn, to the crown. It is ſo called from Simon Magus, who offered money for the Holy Ghoſt; and what adds to the crime is, that it is always attended with perjury, the perſon preſented being ſworn to have committed no ſimony.

If any patron for any corrupt conſideration, ſhall preſent or collate any perſon to an eccleſiaſtical benefice or dignity; ſuch preſentation ſhall be void, and the preſentee be rendered incapable of ever enjoying the ſame benefice: and the crown ſhall preſent to it for that turn. But ſhould the preſentee die without being convicted of ſimony in his lifetime, the ſimoniacal contract ſhall not prejudice any other innocent patron, on pretence of lapſe to the crown, or otherwiſe. Further, if any perſon for profit ſhall procure, in his own name, or the name of any other, the next preſentation to any living, and ſhall be preſented thereupon, this is declared to be a ſimoniacal contract, and the parties incur all the penalties of ſimony.

From theſe ſtatutes ſimony is ſettled to be, 1. Purchaſing a preſentation, the living being vacant. 2. A clerk's bargaining for the next preſentation, the incumbent being ſick and about to die. 3. A clerk's buying, either in his own name,

name or another's, the next preſentation, and being thereupon preſented to the living, at ſome future time. But if a father purchaſes ſuch a preſentation for his ſon, it is not ſimony. If a ſimoniacal contract be made with the patron, the preſentation for that turn ſhall devolve to the crown, but the clerk, who is innocent, incurs no diſability or forfeiture.

5. The next kind of forfeitures are thoſe by breach of ſuch conditions as the eſtate is held by.

6. The next ariſes from waſte, which is a deſtruction in houſes, gardens, trees, or other corporeal hereditaments, to the injury of him that hath the reverſion.

Whatever does a laſting damage to the inheritance is waſte, whether it be done voluntarily or permiſſively, that is, whether we pull down a houſe or ſuffer it to fall; but, if it be deſtroyed by tempeſt, lightning, or the like, it is no waſte. Removing wainſcots, floors, or other things fixed to the freehold of a houſe is waſte; alſo reducing the number of creatures in ponds, dove-houſes, warrens, &c. ſo that there will not be ſufficient for the reverſioner. Cutting down timber, or topping and lopping them, ſo as to ruin the trees, is alſo waſte; but the tenant, unleſs reſtrained by ſpecial covenants, may take ſufficient timber for repair of the premiſes and farming implements. Converting land from one ſpecies to another, is alſo waſte; for example, to turn meadow or paſture-land into arable, or to turn arable into wood-land; ſo likewiſe to open land, unopened before, in order to ſearch for mines. And tenants for life, or for a leſs term, are liable to be puniſhed for waſte, unleſs their leaſes be made, *without impeachment of waſte*. The puniſhment for waſte in a guardian is ſingle damages, and forfeiture of wardſhip; but, other tenants ſhall forfeit the place wherein the waſte is committed, and alſo triple damages to him that hath the inheritance; but if waſte, however, be done only in one end of a wood, that part only ſhall be forfeited to the reverſioner.

7. Copyholds may alſo be forfeited to the lord, by breach of the cuſtoms of the manor.

8. Another, and the laſt method by which lands may be forfeited, is an act of bankruptcy. When a man is declared a bankrupt, the commiſſioners have full power to diſpoſe of all his lands and hereditaments, and of all thoſe that ſhall deſcend to him afterwards, before his debts are ſatisfied, and all thoſe which were purchaſed by him jointly with his wife or children to his own uſe, or purchaſed with any other perſon upon ſecret truſt for his own uſe, and divide the produce among his creditors.

V. The moſt cuſtomary method, however, of acquiring a title to eſtates is by alienation; that is, conveyance, or purchaſe, in its limited ſenſe, viz. by bargain or agreement, for money or otherwiſe; whether it be by ſale, gift, marriage-ſettlement, or will. Let us conſider then the ſeveral modes of conveyance, and who are capable of ſelling and buying. And,

1ſt. All perſons in poſſeſſion of eſtates are capable of ſelling and buying, unleſs the law has in any meaſure reſtrained them. If a man has only a right of poſſeſſion, he cannot convey; he may ſell, however, reverſions, but cannot aſſign to a ſtranger contingencies and mere impoſſibilities, unleſs coupled with ſome preſent intereſt.

Perſons attainted of treaſon, felony, and *præmunire*, are incapable of conveying from the time when the offence was committed; for the King or lord ſhall not thus loſe the forfeiture. Though they are diſabled to hold, any eſtate falling to them will be forfeited in conſequence of their crimes. Eſtates alſo purchaſed by corporations will be forfeited to the lord of the fee, unleſs they have a licence to hold in mortmain.

Idiots, lunatics, infants, and perſons under confinement, are in ſome caſes incapable either to convey or purchaſe. Where an idiot purchaſes an eſtate, and does not afterwards, on recovering his ſenſes, agree to the purchaſe (though he cannot render ſuch purchaſe null, by proving himſelf inſane at the time) yet his heir may either reject or accept the eſtate at his option. The King indeed may render the act of an idiot of no validity; and after his death, the next heir or perſon intereſted, may take advantage of his incapacity, and avoid any grant he may make, An infant alſo may refuſe, when he comes of age, any purchaſe he may make during his minority; or ſhould he, when of age, not agree to it, his heirs may refuſe it after his death. Perſons likewiſe under confinement, may affirm or avoid ſuch tranſactions, when their confinement ceaſes; for the law will not ſuffer any one to be impoſed upon. Guardians or committees, however, of a lunatic are empowered to renew in his right, under the directions of the court of Chancery, any leaſe for lives or years, and apply the profits to the uſe of the lunatic or his heirs.

A married woman may purchaſe an eſtate, without the conſent of her huſband; but if he declares his diſſent, the purchaſe is void: but notwithſtanding he may conſent to it, the woman, after the death of her huſband, may continue it or reject it; even her heirs, if ſhe dies before her huſband, and did nothing in her widowhood to declare her conſent, may wave or reject it after her;

her; but the conveyance or other contracts of a married woman (except by ſome matter of record) is abſolutely void.

An alien is peculiarly circumſtanced. He may purchaſe any thing, but can hold nothing that he purchaſes, except a leaſe of a houſe for merchandize; aud not that, unleſs he be an alien-friend, that is, a foreigner with whoſe courts we are at peace. All other purchaſes are forfeited to the King.

Roman Catholics, above the age of eighteen, are alſo diſabled from purchaſing any lands, rents, or hereditaments; but under certain reſtrictions, ſuch as taking the oaths of allegiance &c.

2. We will proceed next to the different modes of conveyance.

The legal evidences of conveyance of property, are called *common aſſurances*, and are of four kinds. 1. Deed; 2. Record; 3. Cuſtom; and, 4. Will.

1. A deed is a writing ſealed and delivered by the parties.

To make a deed valid, the perſon contracting muſt be capable of doing ſo; the deed muſt be founded on good and ſufficient conſideration; not upon a uſurious contract; nor on fraud or colluſion, nor to injure juſt creditors: a deed or grant made, without any conſideration, is conſtrued to be effectual only to the uſe of the grantor. Good conſiderations are thoſe of relationſhip, or affection; as where a man grants an eſtate to his kinsman: thoſe of money, marriage, or the like. A deed muſt alſo be written or printed on paper or parchment, with proper ſtamps or it cannot be given in evidence. In ſhort, no leaſe or eſtate in land, or hereditaments (except leaſes, not exceeding three years from the making, and wherein the reſerved rent is at leaſt two-thirds of the real value) ſhall be looked upon as of greater force than a leaſe or eſtate at will; unleſs put in writing, and ſigned by the party granting, or his agent, lawfully authorized in writing.

A deed is good, though it has no date, or has even a falſe date; provided the real day of it's being dated or delivered be proved. If it be not read at the requeſt of any of the parties, it is void; in which caſe it ſhall bind only the fraudulent party. The party whoſe deed it is, muſt alſo, either by himſelf or his attorney, in order to make it good, ſeal, ſign, and deliver it; and in order to preſerve the evidence, this ſhould be done in the preſence of witneſſes, who are to atteſt the ſame on the deed.

Upon every grant of an eſtate in freehold, and in hereditaments corporeal, whether of inheritance or for life only; corporal poſſeſſion muſt be taken of the land.

This corporal poſſeſſion is either in *deed* or *law*. That in *deed* is thus performed. The grantor, leſſor, or his attorney, goes to the land or the houſe with the grantee, leſſee, or his attorney, and there, in the preſence of witneſſes, declares the contents of the grant or leaſe of which livery is to be made, or poſſeſſion given. If it be of land, the grantor delivers to the grantee, all other perſons being off the ground, a clod or turf, or a twig there growing, with words to this effect, "I deliver theſe to you "in the name of ſeiſin of all the lands and tenements contained in "this deed;" but if it be a houſe, the grantor muſt take the ring or latch of the door, the houſe being quite empty, and deliver it to the grantee in the ſame form; this done, the grantee is to enter the houſe alone, ſhut too the door, and then open it and let in who he pleaſes. Where lands are ſcattered up and down in the ſame county, livery or a delivery of any parcel, in the name of the whole, is ſufficient; but where they lie in different counties, there muſt be a livery in each.

Livery in *law* is not made *on* the land. but in *ſight of it* only; as I give you yonder land, enter and take poſſeſſion. In this caſe, if the grantee enters and takes poſſeſſion, during the life of the grantor, the livery is good, but not otherwiſe; unleſs he does not enter, for fear of bodily harm; in which caſe, a yearly claim made, as near the land as poſſible, will ſuffice.

In leaſes for years, the bare leaſe gives only a right to enter; an actual entry, therefore, is neceſſary to veſt the eſtate in the eſſee.

A parſon or vicar, though he cannot grant longer leaſes, even with the conſent of patron and ordinary, than for twenty-one years or three lives, cannot make any leaſe at all, ſo as to bind his ſucceſſor, without obtaining ſuch conſent, And though leaſes contrary to theſe acts are declared void, yet if the leſſor be a ſole corporation, they hold good againſt him, and are alſo good againſt an aggregate corporation, ſo long as the head of it lives; for the act was made for the benefit of the ſucceſſor only, and no man can benefit by his own wrong.

Leaſes granted by the beneficed clergy are further reſtained by ſeveral ſtatutes, for, if any beneficed clergyman be abſent from his cure above eighty days in any one year, he ſhall not only forfeit one year's profit of his benefice, to be diſtributed among the poor of his pariſh, but all leaſes made by him of the profits of ſuch benefice, and all covenants and agreements of like nature, ſhall ceaſe and be void; except in the caſe of licenſed pluraliſts, who may let the living in which they are non-reſident to their curates, provided ſuch curates do not abſent themſelves above forty days in any one year.

With

With reſpect to *exchanges*; the eſtates to be exchanged muſt be of equal intereſt: that is, fee-ſimple for fee-ſimple; a leaſe of twenty years for a leaſe of twenty years, and the like. But no corporal poſſeſſion, even in exchange of freehold, is neceſſary to complete the conveyance; but entry muſt be made on both ſides, otherwiſe the exchange is void. When two beneficed clergymen, with the conſent of patron and ordinary, exchange their livings, and the one is preſented, inſtituted, and inducted, and the other preſented and inſtituted, and dies before induction, the former ſhall not keep his new benefice, but ſhall return to his old one; becauſe the exchange was not perfected. If, after an exchange, either party be thrown out of that eſtate he takes in exchange, through defect of the other's title, he ſhall return back to the poſſeſſion of his own.

There are two kinds of deeds, not uſed to *convey* lands but to change them; theſe are bonds and recognizances.

A *bond* is a deed, whereby the obligor binds himſelf, his heirs, executors, and adminiſtrators to pay a certain ſum of money to another at a day appointed, or to perform certain conditions under a penal ſum ſpecified.

Where the condition of a bond is, at the time of making it, impoſſible, or it be to do a thing contrary to ſome poſitive rule of law, or be uncertain or inſenſible, the condition alone is void, and the bond ſhall ſtand ſingle and bind the obligor, for his folly, to pay the money without any condition. If it be to do a thing bad in itſelf, the obligation is void. If the condition be poſſible when the bond is given, and becomes afterwards impoſſible by the act of God, the act of law, or the act of the obligee himſelf, the penalty of the bond is ſaved. On the forfeiture of a bond, the courts of equity interfere, and will not (let the penalty be ever ſo great) permit the obligee to take more (if it be for payment of money) than his principal, intereſt, and expences, or the damages ſuſtained, on breach of covenant; nay, in caſe of a bond, conditioned for the payment of money, the payment or tender of the principal ſum due, with intereſt and coſts, even though the bond be forfeited, and a ſuit commenced thereon, ſhall be a full ſatisfaction and diſcharge.

A *recognizance* is a bond of record, which a man enters into to do ſome particular act, ſuch as to appear at the aſſizes, to pay a debt, &c. before a court of record or a magiſtrate properly authorized.

2. The next legal evidence of a conveyance of property is matter of record; depending not on the conſent of the parties themſelves, but on the ſanction of a court of record. Theſe are

private acts of parliament, King's grants, fines, and common recoveries.

*Private acts of parliament.* It ſometimes happens, from various cauſes, that eſtates are ſo entangled, and circumſtanced, as that the owners cannot be relieved by either of the courts of law or equity. In theſe caſes, particular acts are paſſed to unfetter them.

The *King's grants*, otherwiſe called *letters patent*: but theſe do not differ materially from the grant of a ſubject, only; 1. That a grant from the King, at the ſuit of the grantee, ſhall be conſtrued as much as poſſible in favour of the King, whereas that of a ſubject is conſtrued as much as poſſible againſt the grantor. On this account, the King's grants are not uſually made at the ſuit of the grantee, but of the King's ſpecial grace; in which caſe they are conſtrued more liberally. 2. The grant of a ſubject, is held to include many things (though not expreſſed) provided they be neceſſary for the operation of the grant; but not ſo with the King; for was the King to grant land to an alien, he could not hold it, the King's grant not making a denizen; for, ſhould his grant be repugnant to law or reaſon, it is void.

The next ſpecies of aſſurance of record is what is called a fine and recovery: the effect of which, is to cut off entails, and it's explanation is of little moment but to a lawyer.

3. The third legal evidence of the conveyance of property, is ſpecial cuſtom; but this is confined to copyhold lands. Theſe are transferrable only in the court-baron of the lord, and is generally done by ſurrender to the ſteward of the court, to be again granted out by the lord to ſuch perſons, and to ſuch uſes as are named in the ſurrender, and as the cuſtom of the manor warrants. Upon which admiſſion, the new tenant pays a fine to the lord, and takes the oath of fealty. No deed or court of law will convey a copyhold eſtate, it muſt be ſurrendered: but, if the lord refuſes to admit the perſon named in the ſurrender, the court of Chancery will compel him; and the lord, on his part, can oblige the perſon admitted to pay him his cuſtomary fine. If a copyhold eſtate is deviſed by will; the perſon to whom it is deviſed, is entitled to admiſſion; he may even enter on the land before admiſſion, take the profits, may puniſh any treſpaſs done upon the ground, and, on ſatisfying the lord for his fine due upon the deſcent, may ſurrender into the hands of the lord, to whatever uſe he pleaſes.

4. The laſt method of conveying real property, is by deviſe or will. Certain reſtrictions were formerly laid on devi-

to prevent eſtates being given to religious-houſes; but now, it is held, that a deviſe to a corporation, for a charitable uſe, is valid; as being rather an *appointment* than a *bequeſt*.

To prevent frauds in wills, it is enacted, That all deviſes of lands and tenements, ſhall not only be in writing, but ſigned by the teſtator, or ſome other perſon in his preſence, and by his expreſs direction, and be ſubſcribed in his preſence, by three or four credible witneſſes. In the conſtruction, however, of this ſtatute, it is held, that the teſtator's name, written with his own hand, at the beginning of his will, as for example, "I "James Burns do make this my laſt will," is a ſufficient ſigning, without any name at bottom: it hath alſo been determined, that though the witneſſes muſt ſee the teſtator ſign, or at leaſt hear him acknowledge the ſigning, they may do it at different times; and, that witneſſes to wills ſhall be diſintereſted, it is enjoined, that all legacies given to witneſſes are void.

Having now conſidered the ſeveral kinds of conveyances, whereby titles to lands and tenements may paſs from one to another, it may not be improper to ſubjoin a few general rules laid down by the courts, in the conſtruction of ſuch conveyances.

1. Firſt then, the conſtruction muſt be favourable and reaſonable, and as agreeable to the intents of the parties as the rules of law will admit. 2. Where the intention is clear, too minute a ſtreſs ſhall not be laid on the ſignification of words. 3. Bad Latin, or ingrammatical Engliſh, ſhall not affect a deed. 4. Conſtructions ſhall be made on the whole deed, and not on any diſjointed part of it. 5. Deeds ſhall be conſtrued moſt ſtrongly againſt the contractor. 6. Where words will bear two ſenſes, one agreeable to the law, the other repugnant; the firſt ſhall be preferred. 7. Where two clauſes claſh with each other, the firſt ſhall be received; but, where the two clauſes can be reconciled, it ſhall be done. And, 8. Wills ſhall be explained, to purſue, if poſſible, the intent of the teſtator.

## Chap. Fourth.

### OF PERSONAL PROPERTY.

UNDER the idea of Perſonalty, or things perſonal, are included all ſorts of moveable things: but, under the general name of Chattels is included, not only things perſonal, but all ſuch property as comes not under the denomination of eſtates:

eſtates: in ſhort, all ſuch property as has not yet been mentioned.

Now chattels are divided into two kinds, real and perſonal.

*Real* chattels are terms for years of land, preſentation to churches, eſtates by ſtatute merchant, ſtatute ſtaple, or the like. *Perſonal* chattels, then, are the only things as are moveable; for inſtance, animals, houſhold furniture, money, jewels, cloaths, corn, &c. and in treating of theſe, we will conſider the nature of this property, and how a title to it may be acquired or loſt.

Property in perſonal chattels may be either in *poſſeſſion*, or in *action*; that is, where a man has merely a right, without actual poſſeſſion of the property.

I. Now property in poſſeſſion, is of two kinds, *abſolute* and *qualified*.

1. Property in poſſeſſion abſolute, is where a man hath, ſolely, not only the right, but alſo the uſe of any moveable chattels, ſuch as goods, plate, money, jewels, cloaths, vegetables, &c. and domeſtic animals, ſuch as horſes, kine, ſheep, ſwine, poultry, and the like.

2. Qualified property is ſuch, as is not in its own nature permanent, but at times may ſubſiſt or not. For example, it may ſubſiſt in wild animals tamed by art, or in animals confined; ſuch as, ferrets, hawks, deer in a park, hares or rabbits in a warren, fiſh in a private pond or trunks, &c. Theſe are no longer a man's property, than while he has them in poſſeſſion: if they ſtray away and do not return, it is lawful for any one to take them: but, if a deer, or any wild animal tamed, has a collar or mark put upon him, and is ſuffered to go and return at pleaſure, or, if a wild ſwan be caught and marked, and turned looſe in a river, the owner's property ſtill continues, and it is unlawful for any one to take them; but otherwiſe, if a deer has been long abſent, or the ſwan leaves the neighbourhood. Bees are of the wild kind, which a man has property in, if he hives them. If a ſtrange ſwarm ſettles on a tree in my garden, I have no property in it, till I have hived it; if another hives it, it is his property; but, a ſwarm flying out of my hive is mine, while I can keep the bees in ſight and purſue them. It is as much felony by Common Law, to ſteal ſuch confined animals as are fit for food, as to ſteal tame ones; but not ſo, if they are kept only for pleaſure, as is the caſe with cats, bears, parrots, ſinging-birds, and the like; their value depending on the caprice of the owner: an action will, however, lie for ſtealing theſe.

A qualified

A qualified property may alſo ſubſiſt in hawks, rooks, and other birds building in my trees, rabbits and other animals breeding and burrowing in my grounds: at leaſt, till they are able to fly or run away. and then my property expires.

So a man may have a qualified property in wild animals, by privilege, as in that of game, which will be ſhewn hereafter.

Many other things alſo may be the objects of qualified property, as light, air, water, and the like, in which a man can have no permanent property: but, if a man obſtructs my windows, corrupts the air of my houſe or gardens, fouls my water, lets it out, or diverts its courſe, the law will puniſh him.

II. Property in action, is where a man has not the poſſeſſion, but merely a right to uſe the thing in queſtion, and the poſſeſſion of which he may recover by an action at law. Of this kind is money due on a bond, or due from any damage I may ſuſtain; as by a man's breaking his covenants with me.

Titles to perſonal property are next to be conſidered, or the various methods of acquiring and loſing it. Theſe methods are as follow; 1. Occupancy; 2. Prerogative; 3. Forfeiture; 4. Cuſtom: 5. Succeſſion; 6. Marriage; 7. Judgment; 8. Gift, or grant; 9. Contract; 10. Bankruptcy; 11. Will; and, 12. Adminiſtration.

I. Occupancy then is one title. After a declaration of war, any one may ſeiſe to his own uſe ſuch goods as belong to an alien enemy: (except ſuch alien be reſident in England,) and ſuch goods as are brought by ſuch alien into this country, without a ſafe-conduct or paſſport. If an enemy take the goods of an Engliſhman, and they ſhould be afterwards retaken by another ſubject of this kingdom, the goods ſo retaken ſhall become the property of the retaker, on condition, that the goods retaken are brought into port and continue there a night, ſo as to take away all hope of recovery. A man may alſo acquire a kind of qualified property in the perſon of an enemy whom he ſhall take priſoner of war, and may demand a ranſom.

Things found, and not claimed by any owner, become the property of the finder or firſt occupant; provided they do not come under the denomination of waifs, eſtrays, wreck, or hidden treaſure, which belong to the crown.

The benefits of light, air, or water, may alſo be claimed by the firſt occupant. If my window originally overlooked the ground, which my neighbour thinks proper to take, he cannot obſtruct the light: but, if I darken my houſe, by building it cloſe to his wall, I cannot oblige him to remove that wall, the firſt

firſt occupancy, or prior right, being rather in him than in me. If he ſhould ſet up any kind of manufactory, that may prove a nuiſance to me, by corrupting the air or water, the law will yield me a remedy; but, if ſuch manufactory was originally there, and I fix my habitation near it, it is a nuiſance of my own ſeeking, and I have no remedy.

All kinds of animals, except whales, ſturgeon, and game, are the property of the firſt taker, provided they are caught upon the territories of thoſe who take them.

If, by any operation upon a thing, a perſon ſhall alter its very kind, he acquires a property in it by ſuch alteration: for example, if he converts another man's fruit into wine, or his wheat into bread, the owner of the fruit or wheat ſhall have no claim on the wine or bread: but ſhall be paid merely for the fruit or wheat. If one man, however, takes away the wife or child of another, and cloaths them, the cloaths ſhall ceaſe to be the property of the perſon who furniſhed them, the inſtant ſuch wife or child is retaken by the huſband or father; they being annexed to the perſon of the woman or child.

But in mixtures of goods, where one ſhall wilfully intermix his corn, hay, or other matters, with that of another perſon, without his approbation; the perſon ſo mixing them loſes his property, and the other becomes the owner of it,

Under the title of occupancy, may be conſidered what is called literary property, *viz.* the right an author has in his own compoſitions; it being now ſettled, that the author and his aſſigns ſhall have the ſole liberty of printing and reprinting his works for the term of fourteen years, but no longer; if at the end of that term, however, the author himſelf be living, the right ſhall then return to him for another term of the ſame duration; and a ſimilar privilege is extended, for the term of twenty-eight years, to the inventors of prints and engravings. Patents of privilege are alſo granted by the King, for fourteen years, to the inventor of any new manufacture or machine, for the ſole working or making the ſame, veſting thus a temporary property in the patentee.

II. Another method of acquiring property in perſonals is, by the King's prerogative, whereby the King, or any other, under the title of the crown, may claim a right to them.

Of this kind are all tributes, taxes, and cuſtoms, whether being branches of the royal revenue, or ſettled by Acts of Parliament. Under this head may alſo be conſidered all forfeitures and fines.

In theſe different ways of acquiring property, the King, in

one entire thing, can have no *joint* property; but where the claim of the King and a ſubject join, the King ſhall have the whole; in the ſame manner, as where an eſtate is given to the King and a ſubject jointly, the King does not become a joint-tenant with the ſubject, for that would be below his dignity, but he will have the eſtate wholly to himſelf, If a bond be made to the King and a ſubject, the King ſhall have the whole penalty; or, if two perſons have a joint debt owing to them on bond, and one of them aſſigns his part to the King, or is attainted, whereby his moiety is forfeited to the crown, the King ſhall have the entire debt; for it is a maxim in law, that the King ſhall never loſe his right, and where the intereſt of a ſubject interferes with that of the King, the King's ſhall ever be preferred.

Prerogative gives the King a claim alſo to wrecks, waifs, eſtrays, treaſure-trove, to whale, ſturgeon, ſwans, and the like. Alſo, to a certain kind of copy-right: to the excluſive right of printing at his own preſs, or that of his grantees, all acts of Parliament, Proclamations, Orders of Council, the Bible, and Books of Common Prayer; and he is alſo ſaid to have a right to the copies of ſuch Law-books, Grammars, &c. as were compiled or tranſlated at the expence of the crown.

The King has likewiſe a right to *game*, with an excluſive privilege of purſuing, taking, and deſtroying it; and no man but he who has a free-warren by grant from the crown, or preſcription, which ſuppoſes ſuch a grant, can juſtify ſporting upon another man's ſoil; or, indeed, ſporting at all. By the acquieſcence of the crown, and the frequent grants of free-warren, by the introduction of modern penalties, and by certain ſtatutes, for preſerving the game, every man, qualified, as it is called, that is, exempted from theſe penalties, looks on himſelf at liberty to kill what game he pleaſes; whereas, he has, in fact, no power to kill game, unleſs he can ſhew that he is a free warrener, or authorized under ſome Act of Parliament. Owners of manors are empowered to appoint gamekeepers to kill game, for the uſe of ſuch owners; but this *qualifies* no one except the gamekeeper. Modern qualifications of 100l. a year, &c. are merely exemptions from penalties, but do not exempt thoſe who kill game, from actions of treſpaſs by the owner of the land; nor, if they kill game within the limits of any royal franchiſe, do they exempt them from the actions of ſuch as have the right of free-warren therein. It is held, indeed, that if a man ſtarts any game within his own grounds, and follows it into thoſe of another, and kills it there, he has a property in what

what he ſo kills; from the property continuing in his poſſeſſion by the immediate purſuit. So, if a ſtranger ſtarts game in one man's free-warren, and hunts it into the liberty of another, the property continues in the owner of the warren, for the ſtranger can have no property in it: or, if a man ſtarts game on another's private ground, and kills it there, the property belongs to the owner of the ground; but, if being ſtarted there, it be killed in the grounds of a third perſon; it, in this caſe, becomes the property of the killer, though he is guilty of a treſpaſs to both owners.

III. Forfeitures are a third method of acquiring perſonal property. Theſe ariſe, as puniſhments for various crimes and miſdemeſnors: ſome of them are for offences, bad in themſelves, or againſt the divine law; but the greateſt part are for offences againſt the laws of the land: we will confine ourſelves, therefore, to thoſe offences that incur a forfeiture of *all* the goods and chattels of the offender. Of partial forfeitures, a moiety frequently is the property of the informer, the poor, or other perſons; whereas, total forfeitures belong to the crown; except in one inſtance, that of felony, in a bankrupt's concealing his effects; in which caſe, alone, they belong to the creditors.

The goods and chattels of an offender are forfeited to the crown, by conviction of high treaſon, or miſpriſion of treaſon: of petit-treaſon; of felony in general; and particularly of *felo-de-ſe*, and of manſlaughter: nay, upon conviction of excuſable homicide; by outlawry for treaſon or felony; by conviction of petit-larceny; by flight in treaſon, even though the perſon be acquitted of the fact; by ſtanding mute, when arraigned of felony; by drawing a weapon upon a judge; or ſtriking any one in the preſence of the King's courts; by *premunire*: by pretended prophecies, upon a ſecond conviction; by owling; by the reſiding abroad of artificers; and, by challenging to fight, on account of money won at gaming.

In real property, theſe forfeitures commence at the time of committing the fact; but here, in perſonals, they take place only from the time of conviction; yet a fraudulent conveyance of them, to defeat the intereſt of the crown, is void.

IV. A fourth method of acquiring perſonal property, is by the cuſtom of ſome particular place; or, by the general uſe of the nation. Were I to enter into all the local cuſtoms of the kingdom, the taſk would be almoſt endleſs; it ſhall ſuffice, then,

then to mention three which prevail in moſt places, viz. heriots, mortuaries, and hair-looms.

1. Heriots we have mentioned.

2. Mortuaries are a fee due to the miniſter of many pariſhes on the death of his pariſhioners, which is now ſettled, where mortuaries are paid, to be three ſhillings and four pence for every perſon who leaves goods to the value of ten marks, and not exceeding thirty pounds; ſix ſhillings and eight pence for every perſon leaving thirty pounds, and not more than forty pounds; and ten ſhillings for every perſon leaving upwards of forty pounds; but no mortuary ſhall be paid for a married woman, a child, a perſon of full age, not a houſekeeper; nor for any wayfaring man; but ſuch wayfaring man's mortuary ſhall be paid to the pariſh to which he belongs.

3. Heir-looms are ſuch goods and chattels, as by ſpecial cuſtoms, contrary to the nature of chattels, go, with the inheritance, to the heir at law, and not to the executor of the laſt proprietor: they are generally ſuch things as cannot, without injury, be ſeparated from the inheritance, as deer in an authorized park, fiſh in a pond, pigeons in a dove-cote, &c. otherwiſe the rule is, that ſuch perſonals ſhall veſt in the executor, though expreſsly given to a man and his heirs. Carriages and houſehold furniture may be heir-looms, in places were there is a ſpecial cuſtom to ſupport it, but ſuch cuſtom muſt be proved; but in general, fixtures of a houſe go with a houſe, ſuch as chimney-pieces, fixed benches, pumps, &c. Monuments or tomb-ſtones, eſcutcheons, &c. are alſo heir-looms every where; which the parſon of the church cannot remove or deface, without being liable to an action from the heir. Pews alſo, by cuſtom immemorial, may deſcend, without any eccleſiaſtical concurrence, from the anceſtor to the heir: but the heir has no property in the dead bodies of his anceſtors. The parſon, as owner of the ſoil, may bring an action againſt any one that digs or diſturbs the ground; and whoever taking up a dead body, ſteals the ſhroud or grave-cloths, is guilty of felony; the property of which being in the perſon who was at the expence of the funeral.

Heir-looms, though mere chattels, cannot be deviſed away from the heir by will; though the owner in his life-time might have either ſold or deſtroyed them.

V. Another method of acquiring perſonal property is by ſucceſſion. This right is univerſally inherent by Common Law in all aggregate corporations as dean and chapter, mayor and commonalty, maſter and fellows, and the like; in the King, and in ſuch ſingle corporations as repreſent a number of perſons; for example, the maſter of an hoſpital, who repreſents the poor

brethren; or the dean of ſome cathedral, who repreſents the chapter; but this right may, by ſpecial cuſtom, belong to certain other ſole corporations, for ſome particular purpoſes, as to the chamberlain of London, who is a ſole corporation for the benefit of the orphan's fund; but generally in ſole corporations no ſuch right can exiſt.

Chattels left therefore to ſuch a corporation, though their ſucceſſors be not named, veſts an abſolute property in them, ſo long as the corporation ſubſiſts. But if chattels be deviſed to ſole corporations, as to the biſhop of London and his ſucceſſors, or the rector of any place and his ſucceſſors, in ſuch caſe their executors or adminiſtrators ſhall have them, and not the ſucceſſors. The King, as a ſole corporation, is an exception to this rule, in whom a chattel intereſt, given to a preceding King, and his ſucceſſors, ſhall veſt.

VI. A ſixth method of acquiring chattels is by Marriage, all perſonal property belonging to the wife before marriage, being abſolutely veſted in the huſband by marriage. In real eſtates the huſband gains only a title to the rents and profits during the time ſhe is his wife; but in chattel intereſts the huſband has the abſolute diſpoſal of them, if he chuſes to take poſſeſſion of them; but unleſs he takes ſuch poſſeſſion, by exerciſing ſome act of ownerſhip upon them; they ſhall become, at the diſſolution of the marriage, the property of the wife or her repreſentative.

A real chattel of the wife, by marriage, veſts in the huſband, but not abſolutely; as in the caſe of a leaſe for years, the huſband is entitled to all the rents and profits of it, and may, if he pleaſes, ſell, ſurrender, or diſpoſe of it, during the coverture or the time ſhe is his wife; if he be outlawed or attainted, it ſhall be forfeited to the King; it is liable to execution for his debts; and, if he ſurvives his wife, it is, to all intents and purpoſes, his own. Yet if he has made no diſpoſition of it, and dies before his wife, he cannot diſpoſe of it by will, nor does it go to his executors, but remains veſted in his wife, and at her diſpoſal. In manner all debts due to the wife before marriage, if not ſued for and recovered by the huſband, ſhall, after his death, be the property of his widow; but upon the huſband's receiving them in his life-time, he may diſpoſe of them at his death as he pleaſes. But in caſe the huſband ſhall ſurvive the wife, he can claim a real chattel, by ſurvivorſhip, but not money due to the wife before marriage, except it be arrears of rent, which, in caſe of her death, are given to the huſband. He may, however, as her adminiſtrator, recover any money that was due to her before marriage. With reſpect to perſonal chattels which the wife has in her poſſeſſion,

poſſeſſion, as money, jewels, furniture, and the like, the huſband has, by the marriage, an abſolute and immediate property veſted in him, which can never afterwards reveſt in the wife or her repreſentatives.

Such things as are called the wife's *paraphernalia*, the widow is entitled to, on the death of her huſband; and he cannot bequeath them away by his will; though, during his life, he had power to ſell them or give them away. If ſhe continues to wear them till his death, ſhe can keep them, in oppoſition to his executors, adminiſtrators, and all other perſons, except creditors, where there are not aſſets ſufficient to pay his debts. Now theſe *paraphernalia* are the apparel and ornaments of a wife, ſuitable to her rank and degree: the jewels of a peereſs, uſually worn by her, are held to fall under this deſcription.

VII. A Judgment in a court of law, in conſequence of ſuit or action, is another mode of acquiring perſonal property. I mean judgment given in favor of penalties inflicted by particular ſtatutes, the whole, or a moiety of which goes to the proſecutor or informer.

Damages given by a jury for any injury ſuſtained, is another ſpecies of property acquired by judgment. Here alſo, as in the foregoing, the plaintiff has no claim till after a verdict. Coſts of ſuit likewiſe come under the ſame denomination, and may be conſidered as an acquiſition made by judgment of law.

VIII. An eighth mode of acquiring perſonal property is by Gift or Grant. Gifts are always gratuitous; grants are upon ſome conſideration.

Grants, or gifts of *perſonal* chattels may be executed in writing or by word of mouth, before ſufficient witneſs, and poſſeſſion given in conſequence of it. But ſuch a conveyance, if merely voluntary, where creditors or others ſuffer thereby, is conſtrued as fraudulent.

A proper gift or grant is always accompanied with delivery of poſſeſſion. If one man gives another a horſe or fifty pounds, and puts him in immediate poſſeſſion, the donor has executed his gift, and has no power to retract it, though he did it without a recompenſe, unleſs it prove prejudicial to creditors, or that the donor was under any legal incapacity, as being minor, a married woman, in confinement, or the like, or unleſs he were drawn in, or impoſed upon by falſe pretences, drunkenneſs, or ſurpriſe. But, ſhould the poſſeſſion of the gift be not immediately given, it is not properly a gift but a contract, which the donor is not bound to perform, but on a good and ſufficient conſideration.

IX. In all contracts three things are to be weighed, *viz.* the agreement, the conſideration, and the different ſpecies of contracts.

In an agreement, the contracting parties muſt be in a capacity to make it. And

The contract may be either expreſs or implied. *Expreſs* contracts are where the terms of the agreement are particularly ſpecified; as to pay a ſum of money, to deliver a horſe, or to pay ſuch a price for goods: *implied*, are ſuch as reaſon dictate; as where a man contracts to do certain work for me, the law implies, that I contracted to pay him a fair price for that work; if the work be not well executed, the law alſo implies, that I ſhall be entitled to any damages, I may ſuſtain thereby.

The conſideration is the price or motive of the contract, and muſt be a thing lawful in itſelf, or the contract is void. A good conſideration, as we before have ſeen, is that of blood, or natural affection, between near relations; which may, however, ſometimes be ſet aſide, when it tends to defraud creditors, or others, of their juſt rights. But a contract for any *valuable* conſideration, as for marriage, for money, work done or to be done, or the like, if the value be ſufficient, can never be ſet aſide, even in equity.

An agreement or contract to do or pay any thing on one ſide, without any compenſation on the other, is totally void in law, however the contractor may think himſelf bound in honour or conſcience to perform it; but bonds given to pay money, and promiſory notes, though no conſideration can be proved, are binding on the giver, yet not to the prejudice of creditors, or ſtrangers to the contract.

Let us next conſider the different ſpecies of contracts. Theſe are, 1. Sale; 2. Delivery of goods in truſt; 3. Hiring and Borrowing; and, 4. Debt.

1. Any man may ſell his property, unleſs judgment has been obtained againſt him for a debt or damages, and the writ of execution is actually delivered to the ſheriff; in which caſe, the property of goods ſhall be bound to anſwer the debt, from the time of delivering the writ: nay, if a defendant dies after the awarding of the writ, and before its delivery to the ſheriff, his goods, in the hands of the executors, are bound by it.

If a man agrees with another for goods, he may not carry them away till he has paid for them, unleſs with the conſent of the ſeller: but, if the price be agreed for, and the bargain ſtruck, neither are at liberty to be off, provided the goods be tendered by the ſeller or the money by the buyer; but, if neither

neither money be paid, the goods delivered, nor the tender made, it is no contract, and the owner may diſpoſe of them as he pleaſes. If any part, however, of the price be paid, or any portion of the goods be delivered, as *earneſt*, the contract is binding. Indeed, no contract for the ſale of goods, to the value of ten pounds and more, is valid, unleſs the buyer actually receives part of the goods ſold, by the way of earneſt, or unleſs he gives part of the price to the vender, by way of earneſt, to bind the bargain, or in part of payment; or unleſs ſome note in writing be made and ſigned by the party or his agent, who is to be charged with the contract. And with regard to goods under the value of ten pounds, no contract for the ſale of them ſhall be valid, unleſs the goods are to be delivered within one year, or unleſs the contract be made in writing, and ſigned by the party who is to be charged therewith.

The bargain being ſtruck, if the buyer tenders the money to the ſeller, he may ſeize the goods, or bring an action againſt the vender for the recovery of them.

But property may in ſome caſes be transferred by ſale, tho' the goods be not the property of the ſeller: hence it is incumbent on the buyer to be cautious. Indeed, all ſales and contracts of any thing ſaleable, in fairs or open markets, in law, is not only good between the parties, but will be binding on all thoſe who have any right or property therein. Country markets are held on particular days, and on particular ſpots; but every day in London is market-day, except Sunday, and every ſhop in which goods are expoſed to ſale is a market for ſuch articles as the ſhopkeeper profeſſes to deal in; but, if a man's goods are ſtolen, and ſold out of open market, he may take them, find them where he may; and it is expreſsly provided, that the ſale of any goods, wrongfully taken to any pawnbroker in London, or within two miles thereof, ſhall not alter the property; and even in open markets, if the goods ſold be the property of the King, ſuch ſale will no way bind him, though it binds minors, married women, idiots, or lunatics, and men beyond ſea or in priſon; or if the goods be ſtolen from a ſubject, and then taken from the felon by the King's officer, and ſold in open market: ſtill, if the owner has uſed all diligence in proſecuting of the thief to conviction, he does not loſe his property in the goods. So likewiſe, if the buyer knows the property not to be in the ſeller, or there be any fraud in the tranſaction; if he knows the ſeller to be under age, or a married woman not trading for herſelf; if the ſale be not originally and wholly in a fair or market, or not the uſual hours, the owner's property is not bound there-

by: if a man buys his own goods in a fair or market, the contract of ſale ſhall not oblige him to pay the price, unleſs the property had been before altered by a former ſale; and, notwithſtanding any number of intervening ſales, if the original ſeller, who ſold without having the property, comes again into poſſeſſion of the goods, the original owner may take them, when found in his hands who was guilty of the firſt breach of juſtice.

In horſes, indeed, the property is not eaſily altered by ſale, without the expreſs conſent of the owner. For a purchaſer cannot claim a horſe that has been ſtolen, unleſs it be bought in an open fair or market, and the colour, marks and price of the horſe, with the buyer's and ſeller's names entered in the market book. Nor ſhall ſuch ſale take away the property of the owner, if, within ſix months after the horſe is ſtolen, he puts in his claim before ſome magiſtrate, where the horſe ſhall be found; and within forty days more proves ſuch his property, by the oath of two witneſſes, and tenders to the perſon in poſſeſſion ſuch price as he, *bona fide*, paid for him in open market.

In law, the buyer may demand from the ſeller a ſatisfaction that the goods are his own property; but the vender is not bound to anſwer for the goodneſs of the wares he ſells, unleſs he expreſsly warrants them to be ſound and good, or unleſs he knew them to be otherwiſe, or hath uſed any art to diſguiſe them; or unleſs they turn out different from what he repreſents them.

2. A delivery of goods in truſt, upon an expected or implied contract, that the truſt ſhall be faithfully executed on the part of the perſon to whom they are delivered, is called in law a *bailment*; as, if linen be delivered to a ſempſtreſs to make into ſhirts, ſhe has it on an implied contract to return it made up properly. If goods be delivered to a carrier, he is under an implied contract to carry them to the perſon to whom they are directed. If a horſe or other goods be delivered to an innkeeper or his ſervant, he is anſwerable for them; nay, he ſhall anſwer for them, if ſtolen within the inn, though not delivered to his care, and though he was not acquainted that the gueſts brought the goods there; nay, though he ſhould even tell his gueſt to take the key of his chamber and lock his door, for that he would not be anſwerable for them. So if he puts a horſe to paſture, without the direction of his gueſt, and the horſe is ſtolen, he muſt make ſatisfaction, (but otherwiſe, if with his direction.) If one friend delivers to another any thing to keep for him, the receiver is bound to reſtore it on demand; but, in this caſe, ſhould the thing delivered be loſt or injured, he is not bound

bound to make it good, unleſs ſuch loſs or injury ariſes from ſome groſs neglect.

The property being thus put into the poſſeſſion of the perſon to whom it is delivered, that perſon may maintain an action againſt any one that ſhall injure it, or take it away.

3. Hiring or Borrowing are alſo contracts by which a qualified property may be transferred to the hirer or borrower; both being under an implied engagement to return the thing hired or borrowed at the time ſpecified. Under this head, I am led to ſpeak of the intereſt uſually paid for the loan of money.

The legal intereſt is five *per centum, per annum*, which lenders are authoriſed to take on perſonal or real ſecurity. They cannot take more without incurring the penalties of uſury. They frequently take leſs on mortgage or land ſecurity, but never legally can take more, except on what is called Bottomry or *Reſpondentia*; policies of inſurance; or annuities upon lives.

1ſt. Bottomry is in the nature of a mortgage of a ſhip, when the owner borrows money to enable him to proceed on his voyage, and pledges the keel or bottom of the ſhip to the lender, as a ſecurity for the repayment of the money on his return. Here it is underſtood, that if the ſhip be loſt, the lender loſes his whole money; if it returns, he receives back his principal, and the intereſt agreed on, which, on account of the hazard the lender runs, is allowed to be more than the legal intereſt. Theſe terms are alſo now applied to contracts for the payment of money borrowed, not on the ſhip and lading only, but on the mere hazard of the voyage itſelf, except on ſhips to and from the Eaſt Indies, and of courſe the lender expects a larger than the legal intereſt.

2dly. Policies of inſurance are contracted between two perſons, ſuppoſe A and B; where, upon A's paying to B a *premium* or ſum equivalent to the hazard run, B will indemnify him, or inſure him, againſt any loſs. Thus too, in a loan, if the chance of repayment depends on the life of the borrower, it is uſual (beſides the common rate of intereſt) for the borrower to inſure his life till the repayment: which generally coſts him five *per cent.* or more, according to his age and conſtitution, which, added to the five *per cent.* he pays for the money, makes the intereſt he pays ten *per cent.* In order, however, to prevent theſe inſurances from becoming a miſchievous kind of gaming, it is enacted, that no inſurance ſhall be made on lives, or any other event, wherein the party inſured hath no intereſt: that in all policies, the name of ſuch intereſted party ſhall be inſerted, and nothing more

more ſhall be recovered thereon, than the amount of the intereſt inſured.

3dly. The practice of purchaſing annuities for lives at a given price, inſtead of advancing the ſame ſum by way of loan, takes its riſe from the inability of the borrower, to give the lender a permanent ſecurity to repay the money at any fixed period. He therefore engages, for the ſum he wants, to pay ſo much a year as ſhall be agreed on, as long as he lives, or till he repays the money; and this annual ſum or annuity is more or leſs, according to the age and conſtitution of the borrower. To check, however, any uſurious dealings in this buſineſs, it is enacted, that on the ſale of any life-annuity, of more than the value of ten pounds *per annum*, (unleſs on a ſufficient pledge of lands in fee-ſimple, or ſtock in the public funds,) the true conſideration ſhall be ſet forth and deſcribed in the ſecurity itſelf, and a memorial of the date of the ſecurity, of the names of the parties, for whoſe uſe it is, and on whoſe life it is, and the witneſſes, and of the conſideration money, ſhall, within twenty days after its execution, be inrolled in the Court of Chancery; elſe the ſecurity ſhall be null and void; and in caſe of colluſive practices, reſpecting the conſideration, the court, in which any action is brought, or judgment obtained upon ſuch colluſive ſecurity, may order the ſame to be cancelled, and the judgment, (if any,) to be vacated. And all contracts for the purchaſe of annuities from infants ſhall remain utterly void and incapable of confirmation, after ſuch infants arrive to the age of maturity.

4. The laſt ſpecies of contract, is that of Debt; of which there are three kinds, 1. Debts of record, or money due by the decree of a court of law; 2. Special debts, or money due by deed or inſtrument under ſeal, as bond debts, debts of covenant, debts by deed of ſale, or by leaſe reſerving rent; and, 3. Simple contract debts, ſuch as book-debts, verbal promiſes, promiſſory notes and bills of exchange. A verbal promiſe, with ſufficient witneſs, will create a ſimple contract debt; but no executor or adminiſtrator ſhall be charged upon any ſpecial promiſe, to anſwer damages out of his own eſtate; and no perſon ſhall be charged upon any promiſe to anſwer for the debt or default of another; or, upon any agreement in conſideration of marriage, or upon any contracts, or ſale of any real eſtate, or upon any agreement that is not to be performed within one year from the making; unleſs the agreement be in writing, and ſigned by the party himſelf, or by his authority.

A bill

A bill of exchange is a draught for money, requeſting the perſon drawn upon to pay a certain ſum to a third perſon ſpecified therein. Theſe bills are either *foreign* or *inland*; *foreign*, when drawn by a merchant reſiding abroad, upon his correſpondent in England, and *vice verſâ*; *inland*, when both the drawer and the perſon drawn upon reſide within the kingdom.

Promiſſory notes, are engagements in writing, to pay a ſum ſpecified, at the time therein limited, to a perſon therein named, or his order, or ſometimes to the bearer at large. Theſe are, like bills of exchange, made aſſignable, by the perſons (to whom they are made payable) indorſing them, that is, writing his name on the back. But all promiſſory notes, bills of exchange, draughts, and undertakings in writing, being negotiable or transferrable, for the payment of leſs than twenty ſhillings, are void, and it is penal to utter or publiſh any ſuch; and further, all ſuch notes, bills, draughts, and undertakings, to the amount of twenty ſhillings, and under five pounds, are ſubjected to certain regulations and forms, without an attention to which they become void, and penal to the perſon that utters them, and they muſt be written upon ſtamped paper.

A promiſſory note, payable to A or *bearer*, is negotiable without endorſement, and payment of it may be demanded by any bearer. But, in a bill of exchange, the perſon to whom it is made payable muſt go to the perſon the bill is drawn upon for his acceptance of it; which, if accepted, either verbally or in writing, (the general way is to ſay *accepted* on the face of the bill,) the acceptor makes himſelf liable to pay it. If he refuſes to accept it, and it be of the value of twenty pounds and upwards, and expreſſed in the bill *for value received*, it muſt be proteſted by ſome notary-public, reſident in the place, or by ſome ſubſtantial inhabitant, witneſſed by two perſons; that is, proof muſt be made of the acceptance being refuſed, in which caſe, it muſt be returned to the drawer, with notice of ſuch proteſt, within the ſpace of fourteen days after.

If accepted, and the acceptor refuſes or fails to pay it within three days after it becomes due, it muſt alſo be proteſted in the mode above deſcribed; in which caſe the drawer or the indorſer is bound to pay it, with all expences attending it; but, if no proteſt be made, or notified to the drawer, and any damage ariſes, the holder of the bill muſt abide by the loſs himſelf.

If the bill be an indorſed bill, the holder, if he cannot get the perſon it is drawn on to pay it, may demand the money

money either of the indorſer or the drawer; or if there are more indorſers than one, of any of the indorſers; but, the firſt indorſer has no one to reſort to but the drawer.

What has been ſaid of bills of exchange is applicable to promiſſory notes, only, as in a promiſſory note there is no drawer, it is not neceſſary to proteſt it on payment being refuſed.

Bankrupcy is another mode of acquiring perſonal property. How the *real* eſtate of a bankrupt, may be transferred, has been ſhewn, we have only to conſider the perſonal eſtate,

By the bankrupt laws, all the bankrupt's effects, and all the money owing to him are, by the commiſſioners, veſted in the future aſſignees of his commiſſion, and the commiſſioners by their warrant may cauſe any houſe of the bankrupt to be broke open, in order to ſeize them: and when the aſſignees are choſen by the creditors, the commiſſioners are to aſſign all over to them. But as acts of bankruptcy may be known only to a few, it is enacted, that no money paid by a bankrupt to a real creditor, in a courſe of trade, even after an act of bankruptcy done, ſhall be liable to be refunded: nor, ſhall any debtor of a bankrupt, that pays him his debt, without knowing of his bankruptcy, be liable to account for it again.

XI. XII. There yet remains two other means of acquiring perſonal property; Teſtament and Adminiſtration, which ſhall be treated of jointly. And here we will conſider, 1. Who is capable of making a laſt will or teſtament; 2. The nature of a will and its incidents; 3. What are executors and adminiſtrators; and 4, What their principal office and duty.

1. Every perſon has full power to make a will, unleſs under ſome ſpecial prohibition by law or cuſtom; ſuch as, for want of diſcretion; want of liberty and free-will; or on account of criminal conduct.

Under the firſt, are minors, if males, under fourteen: if females, under twelve; madmen, idiots, perſon grown childiſh, thoſe whoſe ſenſes are beſotted with drunkenneſs; and all perſons born deaf, dumb, and blind.

Under the ſecond are priſoners, captives, and the like, provided their confinement is ſuppoſed to deſtroy their free-will; alſo married women, without their huſbands' conſent; (the queen-conſort excepted,) or unleſs their wills relate merely to ſuch things as they poſſeſs, under the office of executrix or adminiſtratrix, which can never be the property of the huſband; or unleſs the property bequeathed be the ſavings of their pin-money or ſeparate maintenance. And if a ſingle woman makes her

her will, and afterwards marries, ſuch marriage makes the will void.

Under the third incapacity, are all traitors and felons, from the time of their conviction, their property being forfeited to the King; all ſelf-murderers, who can only deviſe their lands, their chattels being forfeited; and outlaws alſo, ſo long as their outlawry ſubſiſts; for during that time their effects are forfeited.

2. Wills are of two ſorts, *written* and *verbal*; a *codicil*, being only a ſupplement to a will.

A written will of perſonal property, written in the teſtator's own hand, though it has neither his name nor ſeal to it, nor witneſſed, provided the hand-writing can be proved, is good, and though written by another, and not ſigned by the teſtator, yet, if proved to be according to his inſtructions, and proved by him, is a good will of perſonal eſtate.

Verbal or nuncupative wills or codicils being liable to great impoſitions, it is enacted, That no written will ſhall be revoked or altered by a ſubſequent nuncupative one, except the ſame be in the life-time of the teſtator reduced to writing, and read over to him and approved; and unleſs the ſame be proved to have been ſo done by the oaths of three witneſſes, ſuch as are admiſſible upon trials at Common Law: That no nuncupative will ſhall in any wiſe be good, where the eſtate bequeathed exceeds thirty pounds, unleſs proved by three ſuch witneſſes, preſent at the making thereof, and unleſs they or ſome of them were ſpecially required to be a witneſs thereto by the teſtator himſelf; and unleſs it was made in his laſt ſickneſs, in his own dwelling-houſe, or where he had been previouſly reſident ten days, except he be ſurpriſed with ſickneſs on a journey, or from home, and dies without returning to his dwelling. That no nuncupative will ſhall be proved by the witneſſes after ſix months from the making, unleſs it were put in writing within ſix days: nor ſhall it be proved till fourteen days after the death of the teſtator, nor till proceſs hath firſt iſſued, to call in the widow or next of kin to conteſt it, if they think proper.

Wills are of no validity if made by a perſon labouring under any of the incapacities before-mentioned; if a will of a later date be proved, or if the will made be afterwards revoked or cancelled. Even without an expreſs revocation, if a man who hath made his will, afterwards marries and has a child, this, in law, is an implied revocation of the will made when he was ſingle.

3. We are next to conſider what are Executors and Adminiſtrators.

An executor is the perſon to whom a teſtator commits by will

the execution of his will. And not only perſons that are capable of making a will themſelves, are capable of being executors, but alſo married women and infants, nay infants unborn, in the womb of their mother; but no infants can act before ſeventeen years of age, till which time adminiſtration muſt be granted to ſome other; ſo muſt it, if the executor be abroad, or while the validity of the will is in conteſt. But where a will is made, and no executor named, or if incapable perſons are nominated, or executors refuſe to act; the biſhop of the dioceſe muſt grant adminiſtration to ſome other perſon; in which caſe the duty of an adminiſtrator differs little from that of an executor.

Where a man dies inteſtate, the Ordinary or dioceſan is, 1. obliged to grant adminiſtration of the effects of the wife, to the huſband, or his repreſentative, and of the huſband's effects to the widow or next of kin; but he may grant it to either or both, as he pleaſes. 2. Among the relations he muſt prefer thoſe that are neareſt of kin to the diſeaſed; but of perſons of equal kindred, he may appoint whom he thinks proper. 3. Where none of the relations will adminiſter, a creditor by cuſtom, may do it. 4. If the executor refuſes or dies inteſtate, adminiſtration may be granted to the reſiduary legatee, in excluſion of the next of kin; and in defect of all theſe, the Ordinary may grant adminiſtration to any perſon he pleaſes. If a baſtard, or any one without kindred, dies inteſtate, and without wife or child; any perſon procuring authority from the Crown, may oblige the Ordinary to grant him adminiſtration.

4. Let us now enquire into the chief duties of an executor or adminiſtrator: which are much the ſame in both; only that the executor is bound to perform a will, which an adminiſtrator is not, unleſs where a teſtament is annexed to his adminiſtration. An executor may alſo do many acts before he proves the will, which an adminiſtrator cannot, an adminiſtrator deriving his power not from the will, but the probate, and the appointment of the Ordinary. If a ſtranger takes upon him to act as executor by intermeddling in the affairs of the deceaſed, without authority, he is liable to all the trouble of an executorſhip without any of the advantages; but merely doing neceſſary or humane acts, ſuch as locking up the effects, or burying the corps, is not taking up the office of an executor. Such a one cannot bring an action himſelf, in right of the deceaſed, but actions may be brought againſt him. He is liable to pay the debts of the deceaſed as far as he has in hand aſſets ſufficient, and ſhall be allowed in his account all payments made to any creditor except himſelf, provided ſuch payments are made to creditors of the ſame or a

ſuperior

ſuperior degree to thoſe unpaid, as will be explained below; and though he cannot plead ſuch payment againſt the demand of rightful executor or adminiſtrator, yet it ſhall be allowed him in mitigation of damages; unleſs perhaps where there are not ſufficient aſſets left to pay that rightful executor.

The duty of a rightful executor or adminiſtrator is to bury the deceaſed in a manner ſuitable to the property he leaves. Neceſſary funeral expences are firſt allowed: if he is extravagant in the funeral, it ſhall be only prejudicial to himſelf, and not to the creditor or legatees of the deceaſed, for they muſt be firſt paid before any extravagance be allowed. He muſt alſo prove the will of the deceaſed, by ſwearing to it before the ordinary or his ſurrogate, or where its validity be diſputed, by bringing witneſſes; the certificate given of this proof is called the *Probate*. The executor or adminiſtrator is alſo, if required by the ordinary, to make an inventory of the goods and chattels of the deceaſed, and deliver it in to him upon oath. He is to collect all the effects ſo inventoried, and has the ſame property in them as the principal had when living, and the ſame remedies to recover them. In caſe of two or more executors, a ſale or releaſe by one binds the reſt; but not ſo in caſe of two adminiſtrators. All ſuch goods and chatels as are ſaleable, and can be converted into money, are called *Aſſets*, and, as far as theſe will go, the executor or adminiſtrator is liable to pay a creditor or legatee. He may convert them into money for that purpoſe. In paying debts he muſt obſerve the rules of priority, otherwiſe, where there are not aſſets ſufficient, if he pays debts of a lower nature firſt, he muſt pay thoſe of a higher out of his own property. After paying all funeral charges, and the expences of the probate, and the like, he muſt pay debts due to the King on record or ſpecialty; then ſuch as are by particular ſtatutes to be prefered to all others, as forfeitures for not burying in woollen, money due for poor's-rates, for letters to the poſt-office, and ſome others; then debts of record, ſuch as judgments, ſtatutes, and recogniſances; then debts due on ſpecial contract, ſuch as rent, bond-debts, covenants, and the like, under ſeal; then ſervants wages; and, laſtly, all ſimple contract debts, ſuch as book-debts, promiſſory notes, bills of exchange, and verbal promiſes. Of all debts of equal degree, he may pay himſelf firſt, provided he is the rightful executor or adminiſtrator, not elſe. If a creditor appoints a debtor to be his executor, he, in this act, diſcharges the debt, whether the executor acts or no, provided there be aſſets ſufficient to pay his debts. If no ſuit be commenced againſt the executor, he may pay any one creditor in equal degree his whole debt, though he had nothing

left for the reſt; as without a ſuit commenced, the executor has no legal notice of the debt.

The debts all diſcharged, the legacies are next to be paid, as far as the aſſets will extend: but the executor or adminiſtrator cannot, as in the caſe of debts, pay himſelf firſt. Where there is a deficiency of aſſets all the *general* legacies muſt abate proportionably, but a *ſpecific* legacy (of a piece of plate, a horſe, or the like) is not to abate at all, unleſs there be not ſufficient to pay the debts. Where legacies are even paid, the legatees are bound to refund in proportion, if debts, unknown before, come in, in order to pay them.

Where the legatee dies before the teſtator, the legacy is loſt or lapſed, and ſhall go to the general ſtock. If a legacy be left to any one *when* he attains, or *if* he attains, the age of twenty-one, and he dies before that age, it is a lapſed legacy; but if it be left *to be paid* when he attains the age of twenty-one, it is a veſted legacy, and if the legatee dies before that age, his repreſentatives ſhall receive it out of the teſtator's perſonal eſtate, at the time it would have been payable had the legatee lived. But if ſuch legacies be charged on a real eſtate, in both caſes they ſhall lapſe for the benefit of the heir. In veſted legacies due immediately, and charged on land or money in the funds, intereſt ſhall be payable thereon from the teſtator's death; if charged only on the perſonal eſtate, which cannot be immediately got in, they ſhall bear intereſt only from the end of the year after the death of the teſtator.

Nothing given as a legacy can be taken by the legatees, without the conſent of the executor or adminiſtrator; except a perſon in his laſt moments ſhould deliver or cauſe to be delivered to another, to keep, in caſe of his deceaſe, the poſſeſſion of any perſonal goods, bonds, or bills drawn by the deceaſed upon his banker: yet even theſe gifts ſhall not prevail againſt creditors.

All debts and legacies being diſcharged, the ſurplus, if any, muſt be paid to the reſiduary legatee, if any be appointed in the will; if not, it ſhall be the property of the executor, provided he has no legacy left him, and there appears nothing on the face of the will to imply the contrary: otherwiſe, it ſhall go to the next of kin, as it would, was there only an adminiſtrator. With reſpect to the property of an inteſtate, where no will is made, after his debts are paid, it is enacted, That the ſurplus, (unleſs the inteſtate be a married woman) ſhall, after the expiration of one full year from the death of the inteſtate, be diſtributed in the following manner: One third ſhall go to the widow, and the reſidue in equal proportions to his children, or

if

if dead, to their repreſentatives; if no widow, the whole ſhall go to the children; if no children, the whole ſhall be diſtributed among the next of kin in equal degree, and their repreſentatives: but no repreſentatives are admitted among collaterals, farther than the children of the inteſtate's brothers and ſiſters. The father ſucceeds to all the perſonal effects of his children dying inteſtate and without iſſue, in excluſion of the brothers and ſiſters of the deceaſed: but if the father be dead and the mother alive, the perſonal effects of ſuch children ſhall go equally to the mother and her remaining ſons and daughters or their repreſentatives.

In another part of the ſtatute of diſtributions, it is directed, that no children or child of the inteſtate (except his heir at law) on whom he ſettled in his life-time any eſtate in lands, or pecuniary portion equal to the diſtributed ſhares of the other children, ſhall have any part of the ſurpluſage with their brothers and ſiſters; but if the eſtates ſo given them, by way of advancement, are not quite equivalent to the other ſhares, the children ſo advanced ſhall now have ſo much as will make them equal. This ſtatute, however, expreſsly excepts the cuſtom of the city of London, the province of York, and other places having peculiar cuſtoms.

In the city of London and province of York, and in the kingdom of Scotland, the perſonal eſtate of an inteſtate, after payment of his debts, is diſtributed as follows. If the deceaſed leaves a widow and children, his effects (deducting the widow's apparel, and the furniture of her chamber, which are her own) are divided into three parts, one of which ſhall go to the widow, another to the children, and a third to the adminiſtrator: if only a widow, or only children, the widow or children ſhall have one half, and the adminiſtrator the other: if neither widow nor child, the adminiſtrator ſhall have the whole. But it is likewiſe ordained by ſtatute, that the adminiſtrator's part ſhall alſo be diſtributed. The diſtribution is thus: The perſonal eſtate of a man dying inteſtate, and leaving a widow and two children, ſhall be divided into eighteen parts, of which the widow ſhall have eight; that is, ſix by the cuſtom, and two by the ſtatute; and each of the children five; that is, three by the cuſtom, and two by the ſtatute. If he leaves a widow and one child, ſhe ſhall ſtill have eight parts as before, and the child ſhall have ten; that is, ſix by the cuſtom, and four by the ſtatute: if he leaves a widow and no child, the widow ſhall have three fourths of the whole, that is, two fourths by the cuſtom, and one by the ſtatute; and the remaining fourth ſhall

go to the next of kin. But, if the wife be provided for by a jointure before marriage, in bar of her cuſtomary part, ſhe ſhall be entitled to her ſhare of the adminiſtrator's part, unleſs barred by ſpecial agreement. And if any of the children are advanced by their father, in his life-time, with any ſum of money (not amounting to their full proportionable part) unleſs ſuch children conſent to divide the money ſo advanced with the reſt of the brothers and ſiſters, in equal proportions with the remainder of the property to be divided among them, they ſhall not be entitled to any benefit under the cuſtom: and if they are fully advanced, the cuſtom entitles them to no farther dividend. So far the cuſtoms of London and York agree. But,

In London the ſhare of the children is not fully veſted in them till the age of twenty-one; nor can they diſpoſe of it by will before; and if they die under that age, ſingle or married, their ſhare ſhall devolve to the other children. And in the province of York, the heir at common law, who inherits any land, is excluded from any child's part.

# BOOK III.

## ON PRIVATE INJURIES.

### Chap. First.

### OF SELF REDRESS, AND REDRESS BY THE OPERATION OF LAW.

HAVING conſidered the *rights* of perſons and things, we will now proceed to their *wrongs* or injuries.

Wrongs are of two ſpecies, *private* and *public*. Private wrongs are an infringement of the rights of individuals, and therefore called *civil injuries*; public wrongs are a violation of public rights, and are called *crimes* and *miſdeameanors*. Civil injuries then ſhall be the ſubject of this book; crimes and miſdeameanors, of the concluding one.

To redreſs civil injuries, courts of juſtice are eſtabliſhed, and our remedies are by applying to theſe courts: our buſineſs, therefore, here, will be to enquire how this is to be done. Some injuries then may be redreſſed by the parties themſelves; and others by ſuit or action in courts. We will ſpeak at preſent of the firſt.

I. Some injuries then we are allowed to redreſs, ourſelves, as in ſelf-defence, or the reciprocal defence of huſband and wife, parent and children, maſter and ſervant. If a man, or any

of theſe his relations, be forcibly attacked in their perſons or properties, it is lawful for him to repel force by force; but care muſt be taken, that the reſiſtance a man makes does not exceed the bounds of mere defence, leſt he ſhould thus become a tranſgreſſor.

II. Repriſal is another ſpecies of ſelf-redreſs, which the law allows a man occaſionally to take. Where any one is deprived of his perſonal property, or where a man's wife, child, or ſervant is wrongfully detained from him, he may lawfully retake them, find them where he may; ſo as it be not in a riotous manner; for was a man, in ſuch a caſe, to wait for a legal remedy, it might be impoſſible to recover them without their or his receiving ſome injury. If my horſe be taken away, and I find him in a common, or fair, or public inn, I may legally ſeize him: but I cannot juſtify the breaking open a private ſtable, or entering on the grounds of a third perſon to take him, unleſs he be ſtolen; but muſt have recourſe to an action at law.

Where one perſon has, without any right, taken poſſeſſion of another's eſtate, forcible entry by the injured party to recover it, is, on ſome occaſions, allowed; but as theſe are nice caſes, we ſhall ſpeak more of them hereafter.

III. A third ſpecies of redreſs, which the law allows a man to take himſelf, is in the removal of nuiſances, of which, likewiſe, we ſhall ſpeak more hereafter; I ſhall only obſerve at preſent, that whatſoever annoys or injures another is a nuiſance, and the party aggrieved is juſtifiable in removing ſuch an offence, if he can do it without committing a riot. He may, for example, enter his neighbour's ground, and peaceably pull down a wall erected ſo near him as to darken ſuch of his windows as have ſubſiſted time out of mind. If a new gate be erected acroſs a public highway, it is a common nuiſance, and any perſon paſſing that way may cut it or break it down; for, ſuch injuries the law ſuppoſes to require an immediate redreſs.

IV. The next caſe where the law allows a man to be his own avenger, is that of diſtreining cattle or goods for arrears of rent, or treſpaſſing upon his lands. And here, as the law of diſtreſs is proper to be thoroughly known, we will conſider it minutely, and enquire, for what injuries a man may diſtrein; what things he may take, and the manner of taking, diſpoſing of, or remedying diſtreſſes.

The lord of a manor may diſtrein for a man's neglecting to do ſuit to his court: diſtreſs may be had for fines in a court-leet. The owner of land may diſtrein any ſtrange cattle he finds

finds wandering in his grounds and doing him damage. Remedy by diſtreſs and ſale is given alſo for ſeveral duties and penalties inflicted by ſpecial acts of parliament.

Valuable things, not belonging to the tranſgreſſor, but in his poſſeſſion merely by way of trade, ſhall not be liable to diſtreſs; ſuch as a horſe ſtanding at an inn, or in a ſmith's ſhop to be ſhoed, corn ſent to a mill, or cloth to a taylor; but, generally ſpeaking, whatever goods and chattels the landlord finds upon the premiſes, whether they belong to his tenant or lodger, he may diſtrein them for rent, and the lodger has his remedy only by action againſt the tenant. So cattle put out to paſture, or ſtrangers cattle treſpaſſing upon land, may be diſtreined by the landlord of that land, for any rent the tenant may be in arrear, and the ſtranger hath his remedy againſt the tenant; but if the fences of ſuch land be bad, and ſtrangers cattle ſtray into the ground, the landlord cannot diſtrein them, unleſs they have been in one night; but was it the landlord's or tenant's buſineſs to repair ſuch fences, and they neglected to do it, the landlord could not diſtrein them, till notice be given to the owner that they are there, and he neglects to remove them. A man's tools and utenſils of his trade are alſo privileged from diſtreſs. And further, nothing is liable to be diſtreined, that cannot be returned in as good condition as when it was taken, ſuch as milk, fruit, and the like; a diſtrein being, in the nature of a pledge or ſecurity, to be returned when the debt is paid. Landlords are empowered to diſtrein corn, graſs, or other products of the earth, while growing, and to cut and gather them when ripe.

Should the tenant's goods be clandeſtinely removed off the premiſes, the landlord may diſtrein them wherever he finds them, within thirty days after their removal, unleſs they have been *bona fide* ſold for a valuable conſideration, and all perſons privy to, or aſſiſting, ſuch fraudulent conveyance, forfeit double the value to the landlord. The landlord may alſo diſtrein his tenant's beaſts feeding upon any common belonging to the demiſed grounds, and he may, by the aſſiſtance of a peace officer of the pariſh, break open, in the day-time, any place where the goods may have been fraudulently removed and locked up to prevent a diſtreſs, oath being firſt made, in caſe it be a dwelling houſe, of there being reaſon to ſuſpect a concealment of ſuch goods there.

A man entitled to diſtreſs, ſhould diſtrein for his whole demand at once; but, if there be not ſufficient property on the premiſes, or ſhould he happen to miſtake the value of the thing diſtreined, ſo as not to take ſufficient to anſwer his demand, he may

may diſtrein a ſecond time: for, ſhould he take unreaſonable diſtreſs for arrears of rent, he is liable to be heavily fined for ſo doing.

A perſon diſtreining for rent may turn any part of the premiſes, on which a diſtreſs is taken, into a pound for ſecuring of ſuch diſtreſs. If animals be impounded in a *common*, open pound, the owner muſt take notice of it at his peril; but if in any other open pound, ſo conſtituted for the purpoſe, the deſtreinor muſt give the owner notice: and in both theſe caſes, the owner is to provide the beaſts with food. But if they are put into a cloſe pound, as a ſtable or barn, the landlord or diſtreinor muſt feed them. Houſehold goods or other things liable to be damaged or ſtolen, ſhould be put in a cloſe pound, or the diſtreinor muſt anſwer for the conſequences.

Where the owner of a diſtreſs thinks himſelf aggrieved, and wiſhes to conteſt the matter with the diſtreinor, he muſt *replevy* the diſtreſs, that is, give ſecurity to try the matter in a court of law, in which caſe the diſtreſs will be reſtored to him; he being then bound to return the cattle or goods into the hands of the diſtreinor, or pay him his demand with the expences, in caſe it be given againſt him.

If a diſtreſs be not replevied, or the money paid, the diſtreinor is authorized to ſell the diſtreſs and pay himſelf. In all caſes of diſtreſs for rent, if the tenant or owner does not, within five days after the diſtreſs be taken, and notice of the cauſe thereof given him, replevy the ſame, with ſufficient ſecurity, the diſtreinor, with a conſtable, ſhall get it appraiſed by two ſworn appraiſers, and ſell it to ſatisfy the debt and charges, returning the ſurplus, if any, to the owner.——An inn-keeper may alſo detain the goods of his gueſt for the reckoning.

V. Seizing of heriots, due on the death of a copy-holder, is the laſt kind of ſelf-remedy. Similar to this is the ſeizing of waifs, wrecks, eſtrays, deodands, and the like; the perſons intitled to them being juſtifiable in ſeizing them, though they might recover them by action.

There are alſo two modes of ſettling diſputes between the parties themſelves, without any recourſe to a court of law. Theſe are *agreement* and *arbitration*.

*Agreement* is the matter amicably ſettled, and ſatisfaction agreed on between the aggreſſor and party injured, which, when performed, bars all actions on that account.

*Arbitration* is where the matter in diſpute is left to the deciſion of two or more *arbitrators*, who, ſhould they diſagree, refer it to the determination of a third perſon nominated by them, which

which third perſon is called an *Umpire*, and his *award* or determination is final.

## Chap. Second.

### OF COURTS.

THE next object of our enquiry is the redreſs of injuries by application to courts of law.

The three chief parties on a trial are the plaintiff, the defendant, and the judge who tries the cauſe; but in the ſuperior courts there are attorneys and counſel, as aſſiſtants.

An attorney at law is a ſimilar office to a proctor among the civilians, whom the plaintiff or defendant appoints to appear for him, and to manage and conduct his cauſe.

Of counſel there are two degrees, barriſters and ſerjeants. Barriſters are called to the bar, after a certain period of ſtanding in the inns of court. After ſixteen years ſtanding, they may be called to the degree of ſerjeants. The judges of the courts of Weſtminſter are always admitted ſerjeants before they are advanced to the bench. From both ſerjeants and barriſters, the King's counſel are uſually ſelected, the two principal of whom are called his attorney and ſolicitor-general. Counſel are ſuppoſed to plead *gratis*, of courſe they can maintain no action for their fees, and to encourage in them a freedom of ſpeech in the lawful defence of their clients, a counſellor is not anſwerable for any matter by him ſpoken, though it ſhould prove groundleſs, and reflect on the reputation of another; provided it relates to the cauſe he eſpouſes, and is ſuggeſted in his client's inſtructions.

There are three courts of juſtice, whoſe juriſdiction is general throughout the kingdom: 1. The courts of common law and equity; 2. The eccleſiaſtical courts; and, 3. The courts of admiralty.

I. Of the courts of Common Law and Equity; the loweſt is the court of *Pie Poudre*, which ſignifies a pedlar. It is a court incident to every fair and market, of which the ſteward of him who owns the toll of the fair or market is judge. This court has cognizance of all matters of contract that can poſſibly ariſe within the precinct of the fair or market. From this court a

writ of error lies, in the nature of an appeal, to the courts of Weſtminſter.

II. The next in conſequence is a court incident to every manor in the kingdom, called a Court-baron, and held by the ſteward within the ſame manor. In this court the eſtates of copy-holders are transferred, and other matters tranſacted relative to their tenures only.

III. The court of Common Pleas is one of the upper Common Law courts, calculated for redreſs throughout the kingdom at large. The judges of this court are now four in number; one chief and three *Puiſnè* judges, who ſit every day, in term-time, to determine all matters of law ariſing in civil cauſes, whether real or perſonal. An appeal lies from this court to the court of King's Bench.

IV. The court of King's Bench is the ſupreme court of Common Law in the kingdom. It has alſo four judges, a chief juſtice and three *puiſnè* ones.

This court is empowered to be a check upon all inferior courts, and may either ſtop their progreſs, or remove their proceedings here. It has the ſuperintendance of all civil corporations, commands magiſtrates and others to do what their duty requires; protects the liberty of the ſubject; and takes cognizance both of criminal and civil cauſes, it is alſo a court of appeal, into which may be removed all determinations of the court of Common Pleas, and of all inferior courts in the kingdom. The determinations, however, even of this court may be removed by a writ of error into the Houſe of Lords, or the court of Exchequer Chamber, according to the nature of the ſuit and the proceedings.

V. The court of Exchequer is a court of law, and a court of equity too, which is the reaſon of it's being here claſſed, tho' it is inferior to the courts of King's Bench and Common Pleas. It conſiſts of two diviſions, the receipt of the Exchequer, which manages the royal revenue, and the judicial part of it, which is a court of equity and a court of common law.

The court of equity is held before the lord treaſurer, the chancellor of the Exchequer, the chief baron, and three *puiſnè* barons, who derive their names from being choſen out of the barons of the kingdom. Under the fiction of having connexions with the crown, all kinds of perſonal ſuits may be proſecuted in this court. So, on the equity ſide, any perſon may file a bill againſt another on the bare pretence of being the King's accomptant, which is never enquired into. An appeal from the equity ſide lies immediately to the Houſe of Peers, but from the

the common law ſide it muſt be brought into the court of Exchequer Chamber, and from their determination an appeal lies to the Houſe of Lords.

VI. The high court of Chancery is the moſt important of all the upper courts in matters of civil property, and the lord chancellor or lord keeper of the great ſeal, is ſuperior in precedence to any temporal peer, and is the firſt officer of ſtate. He is a privy-counſellor by office, and ſpeaker of the Houſe of Lords by cuſtom. He is the general guardian of all minors, idiots, and lunatics, and has the ſuperintendance of all charitable uſes in the kingdom. He is viſitor, in right of the King, of all hoſpitals and colleges founded by the crown, patron of all the crown livings under twenty pounds a year in the King's books, and has the appointment of all juſtices of the peace throughout the kingdom.

The court of Chancery has two diſtinct tribunals, one being a court of Common Law, the other a court of Equity; the juriſdiction of the former is to cancel the King's letters patent, when made againſt law, or on falſe ſuppoſitions, and to take cognizance of petitions, &c. when the King has been adviſed to do any act, or is put in poſſeſſion of any lands or goods, in prejudice to the right of a ſubject. It takes cognizance alſo of all perſonal actions, where any officer or miniſter of the court is a party. It alſo holds plea of the tithes of foreſt land, where granted by the King, and claimed by a ſtranger againſt the grantee of the crown, and of executions on ſtatutes or recognizances; but the chancellor, as he cannot ſummon a jury, cannot try any cauſe that requires a verdict, but muſt, in ſuch a caſe, deliver the record into the court of King's Bench.

From this common law part, iſſue all original writs that paſs under the great ſeal, all commiſſions of charitable uſes, ſewers, bankruptcy, lunacy, and the like. Theſe writs relating to the people were formerly kept in a hamper, in *hanaperio*, and thoſe relative to the crown, in a little bag: and from thence ariſes the appellations of the *hanaper* and *petty-bag* offices, both which belong to the common law court of Chancery.

The court of equity is, however, become of the greateſt judicial conſequence; yet, an appeal lies from it, as from other ſuperior courts, to the Houſe of Lords.

VII. There is another court called the court of Exchequer Chamber, which is merely a court of appeal to correct the errors of other courts. It conſiſts of all the judges, and ſometimes the lord chancellor; and into this court are ſometimes adjourned, from the other courts, ſuch cauſes as the judges find to

be

be of great weight and difficulty, before any judgment is given upon them in the courts below. But from all the branches of this court of Exchequer Chamber, a writ of error lies to

VIII. The Houſe of Lords; which is the ſupreme court of judicature in the nation. It has, however, no original juriſdiction over cauſes, but is confined to appeals, to correct any miſtake or injuſtice in the courts below.

IX. I muſt not omit to mention the courts of aſſize, and *Niſi prius*, which are a kind of auxiliary courts, compoſed of two or more commiſſioners, ſent twice a year, all round the King's dominions, except in London and Middleſex, where *Niſi prius* courts are held in and after every term, by the chief or other judges of the ſeveral ſuperior courts; and except the four northern counties, where the aſſizes are held only once a year. Their buſineſs is to try, by a jury of the reſpective counties, ſuch cauſes as would otherwiſe come before the courts of Weſtminſter; *niſi prius, unleſs before* the day prefixed, the judges of aſſize go into that part of the country.

We will proceed now to the Eccleſiaſtical courts, and the courts of Admiralty, which are alſo of general jurisdiction: and firſt of the ſpiritual or eccleſiaſtical; and here alſo we will begin with the moſt inferior.

1. The Archdeacon's court is the loweſt; held in his abſence before a judge of his own appointing, called his Official. An appeal lies from this to that of the biſhop.

II. The Biſhop's court is held in the cathedral of each biſhop's reſpective dioceſe, and is called the Conſiſtory court. The biſhop's chancellor or commiſſary is his judge, and from his ſentence an appeal lies to the archbiſhop of the province.

III. The court of Arches is the next ſuperior, and is a court of appeal from the ſentence of all inferior eccleſiaſtical courts in the province of Canterbury, the judge of which is called *dean of the Arches*. But from this court an appeal lies to the court of delegates.

IV. The court of Peculiars is a branch of the court of Arches, and has juriſdiction over all thoſe pariſhes, throughout the province of Canterbury, which, though in other dioceſes, are ſubject only to the metropolitan. All eccleſiaſtical cauſes ariſing within theſe peculiar juriſdictions, are cognizable in this court, from which an appeal alſo lies, as from the court of Arches, to the court of Delegates.

V. The next is the Prerogative court, eſtabliſhed for the trial of all cauſes relative to wills, where the deceaſed left property to the amount of five pounds in two dioceſes; in which caſe

caſe the probate of wills, belongs to the archbiſhop of the province, by way of prerogative. The judge here is appointed by the archbiſhop, from whom an appeal alſo lies to the court of Delegates.

VI. The great court of appeal, in all eccleſiaſtical matters, is the court of Delegates, iſſuing out of Chancery, by virtue of the King's commiſſion, to repreſent his perſon, and hear all appeals made to him. This commiſſion is generally filled with lords ſpiritual and temporal, judges, and doctors of the Civil law.

The Courts of Admiralty are ſuch, as have power to determine all injuries ariſing upon the ſeas, or in parts out of the reach of the Common Law. The Court of Admiralty here is held before the Lord High Admiralty of England, or his deputy. It's proceedings are agreeable to the method of the eccleſiaſtical courts, and of courſe, held at the ſame place. It is no court of record; and an appeal from it lies to the Court of Delegates.

Having treated of the ſeveral courts, whoſe juriſdiction is general, we will proceed to thoſe which are ſpecial, inſtituted only to redreſs particular injuries. Theſe are, 1. Thoſe of commiſſioners of ſewers: 2 Courts of policies of aſſurance: 3. The Marſhalſea: 4. The courts in the principality of Wales: 5. That of the duchy of Lancaſter: 6. Thoſe of the counties palatine: 7. The ſtannary courts in Devon and Cornwall: 8. The ſeveral courts in the city of London, with the courts of conſcience: and, 9, The Chancellor's court in the two univerſities.

I. The court of Commiſſioners of Sewers, is a temporary tribunal. It's juriſdiction is to overlook the repair of ſea-banks, and ſea-walls, the cleanſing of rivers, public ſtreams, ditches, conduits, &c. and is confined to ſuch diſtricts as the commiſſion ſpecifies. This court may fine and impriſon, and the commiſſioners may convict by jury, or on their own view, and may proceed to the removal of anoyances or the preſervation of the ſewers. They may alſo aſſeſs ſuch rates upon the owners of land within their diſtrict, as they ſhall judge right, and levy the ſame by diſtreſs on thoſe who refuſe to pay: nay, they may ſeize and ſell the refuſer's land for that purpoſe; but, their conduct is under the controul of the court of King's Bench.

II. The juriſdiction of the court of Policies of Aſſurance being defective, no ſuch commiſſion has of late years iſſued; inſurance cauſes being now determined by a verdict of merchants in Weſtminſter Hall.

III. The

III. The Marſhalſea Court is held weekly in the Borough of Southwark, and extends now to all manner of perſonal actions which ſhall ariſe between any parties, within twelve miles of his Majeſty's palace at Whitehall. A writ of error lies from it to the court of King's Bench.

IV. Another ſpecies of private courts, are thoſe throughout the principality of Wales, erected at it's reduction. A ſeſſion being appointed to be held twice in every year in each county, by judges appointed by the King, in which cognizance is taken of real and perſonal actions, with the ſame form of proceſs, and in as ample a manner, as in the court of Common Pleas in Weſtminſter; and, writs of error lie from judgments therein, to the court of King's Bench.

V. There is a private court alſo held before the chancellor of the duchy of Lancaſter or his deputy, relative to all matters of equity, concerning lands held of the crown in right of the duchy of Lancaſter; the proceedings in which are the ſame as on the equity ſide, in the courts of Exchequer and Chancery: which courts may take cognizance of the ſame cauſes.

VI. There are alſo courts belonging to the county palatine of Durham, and the royal franchiſe of Ely; having cognizance of matters both in law and equity. The judges of aſſize ſit in Durham and Ely, by virtue of a commiſſion from their reſpective biſhops. The Cinque Ports have alſo courts of their own: but, a writ of error lies from the mayor and jurats of each port, to the lord warden of the Cinque Ports in his court of Shepway, and from the court of Shepway to the King's Bench. A writ of error alſo lies from the courts palatine, to the court of King's Bench.

VII. Another ſpecies are the Stannary Courts of Devon and Cornwall, inſtituted for the adminiſtration of juſtice among the tinners. Theſe are held before the lord warden and his ſubſtitutes. The appeal here lies from the ſteward of the court, to the under-warden; from him to the lord warden, and thence to the privy-council of the prince of Wales as duke of Cornwall, and from thence to the King himſelf.

VIII. The ſeveral courts within the city of London, and other cities, boroughs, and corporations, are, of the ſame kind, private and limited. The chief in the city of London are the ſheriffs courts: from which, a writ of error lies to the court of huſtings, before the mayor and recorder; thence to juſtices appointed by the King's commiſſion, and thence, to the Houſe of Lords. Courts of conſcience alſo, may be conſidered under

under this head, which are courts for the recovery of debts under forty ſhillings, eſtabliſhed in many trading towns.

IX. The laſt ſpecies of private courts, are thoſe of the vice-chancellors in the two univerſities. Here they are at liberty to try and determine, both according to the Common Law or their own cuſtoms, as they pleaſe, all civil actions and ſuits whatſoever, when a ſcholar, or one of their own body is one of the parties, excepting in ſuch caſes where the right of freehold is concerned. The judges of theſe courts are the vice-chancellors and their deputies. From their ſentence, an appeal lies to delegates appointed by the congregation, from thence to other delegates of the houſe of convocation; and, if they all three concur in the ſame ſentence, it is final; if not, the laſt appeal is to judges delegates appointed by the crown under the great ſeal in Chancery.

Having now deſcribed the nature of the ſeveral courts, we are next to point out in which of theſe courts, a man is to apply for redreſs, in every poſſible injury that can be offered either to his perſon or his property.

I. The private wrongs cognizable by the eccleſiaſtical courts, are of three kinds, *viz.* money, matters, marriages, and wills.

1. Of the firſt are ſuch as relate to tithes, and eccleſiaſtical dues. The eccleſiaſtical courts have no power to try the *right* of tithes, unleſs between ſpiritual perſons; between clergymen and laymen, they can only compel the payment of them where the right is not diſputed. Small tithes under the value of forty ſhillings, may be recovered, by complaint to two juſtices; and, the ſame remedy is extended to all tithes withheld by Quakers, under the value of ten-pounds.

The ſpiritual courts have alſo cognizance of non-payment of other eccleſiaſtical dues to the clergy, as penſions, mortuaries, compoſitions, offerings, and ſurplice-fees. But all offerings not exceeding the value of forty ſhillings, may be recovered before two juſtices of the peace.

The Eccleſiaſtical courts have alſo cognizance of ſpoliations, dilapidations, and neglect of repairing the church, and things belonging to it, or for non-payment of a churchwarden's rate made for the uſe of the church or church-yard.

Spoliation is an injury done by one incumbent to another, by taking the profits of his living under a pretended right. Dilapidations are pulling down the chancel, parſonage-houſe, or other building belonging to it, or ſuffering them to decay. In which caſe, the ſucceſſor may bring an action for damages againſt

againſt his predeceſſor, if living, or, if dead, his executors. And all money recovered for dilapidations ſhall, within two years, be employed upon the buildings, in reſpect whereof it was recovered; on penalty of forfeiting double the value to the Crown.

2. Matrimonial cauſes are alſo the province of the Spiritual Courts to try. The ſpiritual court will alſo compel a huſband or wife who ſeparate from each other, without ſufficient reaſon, to live together again, if either of the parties deſire it. Separations and divorces are alſo within the juriſdiction of this court. Where it is improper, from any cauſe ariſing after marriage, ſuch as intolerable cruelty, adultery, or perpetual diſeaſe, and the like, that the parties ſhall not live any longer together; this court will decree a ſeparation from bed and board; but, if the cauſe exiſted before marriage, and was ſuch as rendered the marriage void from the firſt, as being too near of kin, corporal imbecility, or the like, it will pronounce the marriage totally void. In ſeparation from bed and board, an allowance, called alimony, is generally decreed to the wife for her maintenance, ſuitable to her ſituation in life, which, if the huſband does not pay, this court, on an application, will compel him; but, no alimony will be allowed in caſe of divorce for adultery on her part.

3. Cauſes reſpecting wills are alſo heard in this court; and, it will alſo compel executors to pay legacies, where they are with-held; but, it has no way of enforcing it's ſentences, than by excommunication.

An excommunicated man cannot ſerve on juries, be witneſs in any court, nor bring an action to recover lands or money due to him. And, if, within forty days after the ſentence has been publiſhed in the church, the offender does not ſubmit and abide by the ſentence of the court, a writ iſſues to the ſheriff, to take the offender and impriſon him in the county goal, till he is reconciled to the church.

II. Injuries cognizable by the courts of admiralty, are ſuch as are triable by the common Law, but committed on the high ſeas, out of the reach of our ordinary courts of juſtice.

III. With reſpect to the courts of Common Law, all poſſible injuries are here cognizable, that do not fall within the juriſdiction of the Spiritual Courts or courts of Admiralty. Theſe ſhall be the ſubject of the next two chapters; but, there are two injuries I ſhould mention here; theſe are, when juſtice is delayed by an inferior court that has

cognizance

cognizance of the cauſe; or, when ſuch inferior court takes upon it to decide, where it has no cognizance.

1. The firſt of theſe injuries is remedied by a writ of *mandamus*, from Chancery, commanding them in the King's name to proceed to judgment, when, if the judges of the inferior court neglect or refuſe, they may be taken into cuſtody.

A writ of *mandamus*, in general, is a command of the King, from the court of King's Bench, and directed to any perſon, corporation, or inferior court of judicature, requiring them to do ſome particular thing belonging to their office, which the court of King's Bench has previouſly determined to be conſonant to right and juſtice; ſuch as to compel the admiſſion, or reſtoration of the applicant, to any office or franchiſe of a public nature, whether ſpiritual or temporal; to academical degrees; to the uſe of a meeting-houſe, &c. to compel the production, inſpection, or delivery of public books and papers; the ſurrender of the *regalia* of a corporation; to oblige corporate bodies to affix their common ſeal; to compel the holding of a court, and the like. It will alſo compel judges of inferior courts, to do ſpeedy juſtice, where the ſame is delayed; as to oblige the courts of London to enter up judgment; the Spiritual Courts to grant adminiſtration, and the like.

2. The other injury, that of a court's taking up a cauſe which it has no cognizance of, is remedied by a writ of *prohibition*, commanding the judge and parties of a ſuit, in any inferior court, to ceaſe from proſecuting it: and if either the judge or the party ſhall proceed after ſuch prohibition, they may be taken into cuſtody, and puniſhed for the contempt, at the diſcretion of the court that awarded it; and an action will lie againſt them to give the injured party damages.

## Chap. Third.

### OF REDRESS BY APPLICATION TO COURTS BETWEEN SUBJECT AND SUBJECT.

WE now proceed to the ſeveral injuries cognizable by the courts of Common Law; and, firſt we will conſider thoſe injuries committed between ſubject and ſubject; this done, we

we will take into conſideration thoſe injuries that may occur between the crown and a ſubject.

All injuries, whether they affect a man's perſon or property, are of two kinds; the one attended with violence, as batteries, or falſe impriſonment; the other, without violence, as ſlander, or breach of contract; and, as in treating of *rights*, we divided them into thoſe of perſons and things; ſo in treating of injuries or *wrongs*, we will divide them into ſuch as affect the *rights of perſons*, and the *rights of things*, or property.

I. And firſt, as to thoſe wrongs which affect the rights of perſons, the perſonal ſecurity of individuals; they are either injuries againſt, 1. Their lives; 2. Their limbs, or their bodies; 3. Their health; or, 4. Their reputations.

1. Injuries affecting the life of a man we ſhall treat of in the fourth book.

2. Thoſe affecting the limbs or bodies may be committed, 1. By threats of bodily harm, through fear of which a man is interrupted in his buſineſs: where they join, pecuniary damages may be recovered. 2. By aſſault, which is an attempt or offer to beat another, though without touching him: as lifting up a cane or the arm in a threatening manner; or ſtriking at a man, but miſſing him. Damages may be recovered here. 3. By battery, which is the unlawful beating of another. Beating is in ſome caſes lawful, as in the moderate correction of children, ſcholars, and apprentices, or on the principle of ſelf-defence, or in defence of my goods or poſſeſſions, where a man endeavours to deprive me of them. A churchwarden or beadle may alſo juſtify turning a perſon out of church, and prevent his diſturbing the congregation; ſo may a man turn another out of his houſe. But, for unlawful beating, a jury will give adequate damages. 4. By wounding. 5. By maiming, which is depriving a man of thoſe members proper for his defence; theſe are allowed to be not only legs and arms, but a finger, an eye, a fore-tooth and ſome others. For the injuries of aſſault, battery, wounding, and maiming, an indictment may be brought as well as an action, or both together; one at the ſuit of the crown, for breach of the peace; the other, at the ſuit of the injured party for damages.

4. An action, (which is the univerſal remedy for all perſonal injuries done without violence) will alſo lie, where a man's health is injured by the unfair practices of another; as, by ſelling him bad proviſions or wine; by the exerciſe of a noiſome trade, which corrupts the air in his neighbourhood; or, by

by the neglect or unſkilfulneſs of his phyſician, ſurgeon, or apothecary.

5. A ſimilar action will alſo lie, and a jury will give adequate damages for injuries affecting a man's good name; ſuch as ſlanderous words, tending to his damage: or any falſe tale that may endanger him in law, as to ſay he is perjured, or hath poiſoned another; or which may exclude him from ſociety, as to ſay, he has an infectious diſeaſe: or to hurt him in his profeſſion, as to call a tradeſman a bankrupt, a phyſician a quack, or a lawyer a knave. Defamatory words ſpoken of a peer, a judge, or other great officer of the realm, are accounted ſtill more atrocious, and are called *ſcandalum magnatum.* Thus words that would not be actionable, if ſpoken of a common perſon, are highly ſo, if ſpoken of theſe. Words alſo tending to ſcandalize a magiſtrate, or a perſon in a public truſt, are conſidered as more highly injurious, than when ſpoken of a private man. If the offender be proſecuted on behalf of the crown, he may be impriſoned for his ſlander. And it is now held, that for ſcandalous words of the ſeveral kinds beforementioned, an action may be had without proving any particular damage; but, with regard to words that do not, upon the face of them, import injury to the perſon defamed, it is neceſſary that he ſhould prove he has ſuſtained thereby ſome particular damage; for mere ſcurrility, as rogue or raſcal, without any injurious effect, will not ſupport an action. Calling a man heretic or adulterer, are cognizable only in the Spiritual Courts, unleſs temporal damages can be proved, in which caſe, an action will lie for theſe. Defamatory words muſt alſo be *maliciouſly* ſpoken; for, if ſaid in a friendly manner, as by way of advice or concern, they are not actionable. If the defendant alſo be able to prove his words, no action will lie, even though the defamed perſon can ſhew he has received injury thereby.

A man's reputation may be hurt by printed or written libels, pictures, ſigns, and the like, which ſet him in an odious, or ridiculous light. With reſpect to libels, there are two remedies, one by indictment, another by action, and that where the party is indicted, whether the matter be true or falſe; of courſe, on an indictment for a libel, the defendant is not allowed to alledge the truth by way of juſtification; but if an action be brought, which is to give the injured party damages, the defendant may, as for words *ſpoken*, prove the truth of the fact, and ſhew, that the plaintiff has received no injury. If the party be defamed by pictures or ſigns, it is neceſſary to bring home

home the alluſion, and prove, that ſome damage has accrued in conſequence.

Sending a gentleman a wooden gun, or a licence, to keep a public houſe, are libels, for which, informations have been granted. And with reſpect to libels, it matters not whether the party be alive or dead. The publiſher of a written libel is equally guilty with the author, though he knows not the contents of the paper; and if he who reads it, or has heard it read, maliciouſly reads it or repeats in the preſence of others, or lends it or ſhews it to another, he is deemed a publiſher; ſo is one who copies it, unleſs it be to deliver it to a magiſtrate. Even finding a libel on a bookſeller's ſhelf, is a publication of it by a bookſeller, though it be put upon that ſhelf by a ſervant, without his maſter's knowledge; but then it muſt be ſuch a libel as is publicly known. He who writes a libel dictated by another, is guilty of making it; for, though a man ſpeaks libellous words, it is not a libel, unleſs the words be put in writing.

There is ſtill another mode of injuring a man's character, which is, by preferring malicious proſecutions againſt him. In this however the law has given a very adequate remedy in damages, either by an action of conſpiracy, which can be brought, if there are two perſons concerned, or if only one, by a ſpecial action on the caſe for a falſe and malicious proſecution. To carry on an action of conſpiracy, the plantiff muſt obtain from the judges a copy of the record of his indictment and acquittal, which in proſecutions for felony is ſeldom granted, where there was the leaſt probable cauſe to found a proſecution on. But a perſon who has been indicted, and where the bill has not been found by the grand jury, may bring an action againſt the proſecutor for a malicious proſecution. Any probably cauſe, however, for preferring an indictment, will juſtify the defendant.

The ſecond injury that affect the rights of perſons is falſe impriſonment.

Every confinement of the perſon is deemed an impriſonment, whether it be in a common priſon or a private houſe, or even by forcibly detaining one in the ſtreet. In ſhort, it is illegal detention, whether it ariſes from ſome error in legal proceſs, or ſome defect in iſſuing warrants, or executing them; as arreſting by miſtake a wrong perſon; ſerving a writ on a Sunday, or in a privileged place. The remedy for this is removing the injury, and making ſatisfaction for it.

The firſt is by a writ of *habeas corpus*, which enacts, That the priſoner ſhall be brought up before the court, within twenty days.

days. That on complaint and requeſt in writing, or on behalf of any perſon committed and charged with any crime, (unleſs he be committed for treaſon or felony expreſſed in the warrant, or unleſs he is convicted and charged in execution by legal proceſs,) the Lord Chancellor, or any of the twelve judges in vacation, upon viewing the copy of the warrant, or affidavit that a copy is denied, ſhall, unleſs the party has neglected for two terms to apply to any court for his enlargement, award a *habeas corpus* for ſuch priſoner, returnable immediately before himſelf, or any other of the judges, and upon the return made, ſhall diſcharge the party on bail, if bailable. That officers and keepers neglecting to make due returns, or not delivering to the priſoner, or his agent, within ſix hours after demand, a copy of the warrant of commitment, or ſhifting the cuſtody of a priſoner from one to another, without ſufficient reaſon or authority (expreſſed in the act) ſhall, for the firſt offence, forfeit one hundred pounds, and for the ſecond, two hundred pounds to the party grieved, and be diſabled to hold his office. That no perſon, once delivered by *habeas corpus*, ſhall be recommitted for the ſame offence, on penalty of five hundred pounds. That every perſon committed for treaſon or felony, ſhall, if he requires it, the firſt week of the next term, or the firſt day of the next ſeſſion of *oyer and terminer*, be indicted in that term or ſeſſion, or elſe admitted to bail, unleſs the King's witneſſes cannot be produced at that time; and, if acquitted, or, if not indicted and tried in the ſecond term or ſeſſion, he ſhall be delivered from his impriſonment for ſuch imputed offence: but that no perſon, after the aſſizes ſhall be opened for the county in which he is detained, ſhall be removed by *habeas corpus*, till after the aſſizes are ended, but, ſhall be left to the juſtice of the judge of aſſize. That any ſuch priſoner may move for and obtain his *habeas corpus*, as well out of the Chancery, as out of the King's Bench or Common Pleas; and that the Lord Chancellor or judges denying the ſame, ſhall forfeit ſeverally to the party grieved, the ſum of five hundred pounds.

The remedy for falſe impriſonment, is by an action for the ſame, accompanied by a charge of aſſault and battery, wherein the party grieved ſhall recover damages, and the offender is, as for all other injuries committed with force, liable to pay a fine to the King.

But perſonal injuries may be ſuſtained under the four following relations: huſband, parent, guardian, and maſter.

1. Taking away a man's wife, criminal converſation with her, and beating or otherwiſe ill uſing her, are three atrocious injuries to a huſband. Taking

Taking a man's wife away, whether by violence, fraud, or perſuaſion, is puniſhable at Common Law, wherein the huſband ſhall recover damages for the injury; and, the offender ſhall be impriſoned two years, and be fined at the pleaſure of the court. The wife's conſent to go, will not mitigate the offence; both the King and the huſband may have their action; and the huſband is alſo intitled to recover damages againſt ſuch, as perſuade and entice the wife to live ſeparate from him without a ſufficient cauſe.

For adultery, as a civil injury, the huſband may bring an action againſt the adulterer; wherein the damages given are uſually large, according to the rank and fortune of the plaintiff and defendant, and the circumſtances of the caſe.

For beating or otherwiſe ill-uſing a man's wife, if it be a common aſſault, battery, or impriſonment; the huſband and wife may, in their joint names, recover damages by an action. If the ill-treatment be very groſs, ſo as to lay the wife up, the law gives the huſband a ſeparate action, in which he ſhall recover damages.

2. Taking away a man's children is an injury done him, which he may remedy in the ſame manner, as a huſband may the taking away of his wife.

3. Of a ſimilar kind is the injury done to a guardian by taking away his ward, and for which he may recover damages for the benefit of the ward; but a more ſummary method of redreſſing all complaints relative to wards and guardians, is by an application to the court of Chancery.

4. As a maſter, there are two kinds of injuries a man may ſuſtain, the one, by retaining the hired ſervant before his time be expired; the other, by beating or confining him, ſo that he is not able to work. In this caſe, the maſter may not only recover damages by an action againſt the perſon that entices him away; but, he may have an action againſt the ſervant for non-performance of his agreement. If the new maſter, however, was unacquainted with the ſervant's contract, no action will lie againſt him, unleſs he refuſes to reſtore the ſervant upon demand. The other injury, that of beating, confining, or diſabling a ſervant, hangs on the ſame principle; the labour of the ſervant being the property of the maſter. In this caſe, not only the maſter may recover damages, but the ſervant, as an individual, may recover damages likewiſe.

We may here obſerve, that redreſs is only pointed out to one party, the ſuperior, *viz.* the huſband, father, &c. but the wife or child, if the huſband or parent be ſlain, may proſecute the

the criminal by appeal, which is in the nature of a civil ſatisfaction, and of which more will be ſaid in the next book.

II. Our next enquiry is the injuries done to a man in his perſonal property, and that whether the property be in poſſeſſion or not.

1. If it be in his poſſeſſion, it is an injury to deprive him of it, or damage it, and in depriving a man of his property, two things are to be conſidered, whether it be unjuſtly taken from him, or illegally with-held, when lawfully taken.

In unjuſt taking, the perſon injured may recover the goods ſo taken, and damages for loſs ſuſtained by ſuch invaſion.

Other remedies for unjuſt taking of a man's goods, are recovering only a ſatisfaction in damages. As where one takes the goods of another out of his actual poſſeſſion, without a lawful title, which may be done without felony. For example, where a ſervant takes his maſter's horſe, without his knowledge, and brings him home again; where a neighbour takes another's plough left in the field, and uſes it in his own land, and then returns it; for the felonius intent of ſtealing muſt appear, to deem it an act of felony; I ſay ſuch taking out of poſſeſſion is only a tranſgreſſion, for which an action will lie, and the plaintiff ſhall recover damages.

A man may alſo be injured in an unjuſt detainer of his goods, though the original taking might be lawful. As where one man diſtreins another's cattle for breaking into his grounds, and who, before they are impounded, tenders ſufficient amends. If he detains them afterwards, the owner may have an action to recover, and will have damages allowed him for the detainer. Or, if one man lends another his waggon, and he refuſes to return it, the injury conſiſts in the detaining. Any man may take the goods of another if he finds them; but, no finder is allowed to acquire a property therein unleſs the owner be for ever unknown; if he converts them therefore to his own uſe, and refuſes to reſtore them, the owner may recover adequate damages, or the thing itſelf.

As to injuries that may be done to things while in the owner's poſſeſſion, ſuch as hunting his deer, ſhooting his dogs, laming his horſes, or the like; the plaintiff ſhall recover damages in proportion to the injury he has received; and, it is not material, whether the injury be done by the defendant, or his ſervants by his direction, as in this caſe, the maſter is reſponſible for the conduct of his ſervants. Indeed actions will lie againſt them both. And, if a man keeps a dog or other animal uſed to

do

do miſchief, if the owner knows of ſuch evil habit, he muſt anſwer for the conſequences.

2. We proceed now to injuries done to perſonal rights not in poſſeſſion, but ſuch as ariſe from expreſs or implied contracts.

Expreſs contracts include debts, covenants, and promiſes, which may be recovered or enforced by action. With reſpect to promiſes, it may be neceſſary to obſerve, that it is enacted, That in the five following caſes, no verbal promiſe ſhall be ſufficient to ground an action on, but at the leaſt ſome *memorandum* of it ſhall be made in writing, and ſigned by the party to be charged therewith. 1. Where an executor or adminiſtrator promiſes to anſwer damages out of his own eſtate. 2. Where a man undertakes to anſwer for the debt, default, or miſcarriage of another. 3. Where any agreement is made upon conſideration of marriage. 4. Where any contract or ſale is made of lands, tenements, or hereditaments, or any intereſt therein. And, 5. Where there is any agreement that is not to be performed within a year from the making thereof.

Implied contracts include thoſe ſums charged on a man by the ſentence of the law, which he is bound to pay. So, that if a man hath once obtained a judgment againſt another for a certain ſum, and neglects to take out execution thereon, he may afterwards bring an action of debt on this judgment: on this principle it is, that a man is obliged to pay any forfeitures impoſed by the bye-laws or private ordinances of a corporation to which he belongs, or any fines ſet in a court-leet, or court-baron; or, any penalties inflicted for the breach of poſitive laws; or in ſhort, in any thing he has engaged to perform, as far as duty or juſtice requires. As, if I employ a perſon to do any buſineſs for me, the law implies, that I engaged to pay him as his labour deſerved; and, if I neglect to pay him, he has a remedy, by action. Where one has received money belonging to another, without any valuable conſideration given on the receiver's part, the law implies, that the perſon ſo receiving, engaged to account for it to the true owner, and if he unjuſtly detains it, an action will lie againſt him: ſo will it lie againſt a man to whom money is paid through miſtake; or on a conſideration which happens to fail, or through impoſition, extortion, or oppreſſion, or indeed where any undue advantage is taken of the plaintiff's ſituation. And where a perſon has expended any money for the uſe of another, the law ſuppoſes a promiſe of repayment, and an action will lie to enforce it. So will it for the balance of an account: though the beſt way to enforce a ſettling of accounts is by filing a bill in equity, which

which obliges the defendant to give in his account upon oath. The law alſo implies, that every one who undertakes an office, contracts with his employer to perform it properly, and if not done, damages may be recovered by the party grieved; for example, if a ſheriff or goaler ſuffers a priſoner under arreſt to eſcape; if a counſellor or attorney betrays the cauſe of his client; if an inn-keeper does not ſecure his gueſt's goods in his inn; if a common carrier does not deliver the goods he takes, according to the directions; if a farrier lames a horſe in ſhoeing him; if a taylor or other workman does not execute his buſineſs in a workman-like manner; in all theſe caſes an action will lie, and damages may be recovered for a breach of their general undertaking: but, if I employ a perſon in any of theſe concerns, whoſe common buſineſs it is not, I cannot recover damages, unleſs I prove a ſpecial agreement; ſo, againſt an inn-keeper or other victualler that hangs up a ſign, and opens his houſe, for travellers, will an action lie, if he refuſes admittance to any one at proper times. If any one cheats me with falſe dice or cards, by falſe weights or meaſures, or by ſelling me one commodity for another, an action lies againſt him for damages; for the law implies, that all tranſactions are to be fair and honeſt. In contracts likewiſe for ſales, it is ever underſtood, that the ſeller warrants the commodity he ſells to be his own, if it proves otherwiſe, an action for damages will lie for the deceit. In contracts for proviſions, it is always implied that they are wholeſome; and, if the ſeller warrants the commodity on the ſale to be good, if it proves otherwiſe, the law will oblige him to make the buyer a compenſation. If the warrant be not made at the time of the ſale, but after, the warrant is void; and though a ſeller does not warrant the goods he ſells, yet if he knew them to be bad, or took meaſures to diſguiſe them, or if they are in any ſhape different from what he repreſents them, the ſeller is anſwerable for their goodneſs. A general warranty will not, however, guard againſt viſible defects: for example, a man's warranting a horſe to be perfect, that has not a tail nor an ear, will not make him reſponſible, unleſs the buyer was blind; but, warranting a horſe to be ſound, that is blind, will ſubject the ſeller to damages, as the blindneſs of a horſe every one is not acquainted with: and, if cloth is warranted to be of ſuch a length, and it proves otherwiſe, an action will lie for damages, as it would be troubleſome, and injurious perhaps to the cloth to unroll it.

But beſides a ſpecial action on the caſe, a man may recover damages on an action of deceit, where there is fraud in the tranſaction, as where one man does any thing in the name of another, by which he is deceived or injured; as where an attorney brings an action in the name of another, and then ſuffers a nonſuit, whereby the plaintiff becomes liable to coſts; or where one ſuffers a fraudulent recovery of lands or chattels to the prejudice of him that hath right.

In ſhort, the non-performance of contracts, expreſs or implied, includes every poſſible injury to perſonal property not in poſſeſſion.

We come next to conſider injuries to real property, or affecting real rights. Theſe are ſix; 1. Ouſter; 2. Treſpaſs; 3. Nuiſance; 4. Waſte; 5. Subtraction; and, 6. Diſturbance.

I. Ouſter of a freehold, is a diſpoſſeſſing the right owner in any way. The remedy for which is an action at law, when the owner may recover the poſſeſſion and damages for the injury ſuſtained.

With reſpect to leaſes, where tenants are in arrear, it is enacted, That every landlord, who hath by his leaſe a right of re-entry in caſe of non-payment of rent, when half a year's rent is due, and no ſufficient diſtreſs is to be had, may ſerve a declaration in ejectment, and a recovery in ſuch ejectment ſhall be final and concluſive, unleſs the rent and all coſts be tendered within ſix months afterwards.

II. Treſpaſs, is an entry on another man's ground without a lawful authority, and doing ſome damage, though it be merely the treading down of the graſs; for which, an action will lie, and a jury will give adequate ſatisfaction.

A man is reſponſible alſo for the treſpaſs of his cattle, whether they ſtray or break into the grounds of another: in which caſe, the party grieved may either diſtrein them, till the owner ſhall make him ſatisfaction; or he may recover damages by an action.

In ſome caſes, entry on another's land may be juſtified; as when a man comes to pay or demand money, or to execute legally a proceſs of law. A man may enter a public houſe without aſking the owner's leave; ſo a landlord may juſtify entering to diſtrein for rent; a commoner to attend his cattle commoning in another's land, and, a reverſioner to ſee if any waſte be committed on the eſtate. The poor alſo, by the Common Law, may enter and glean on another's ground after harveſt. Badgers and foxes, or any other ravenous beaſt, may be

be hunted in another man's land, the deſtruction of them being of public utility: but in caſes, where a man makes an ill uſe of the power he has, he ſhall be deemed a treſpaſſer from the beginning; as where a man, contrary to the inclinations of the owner, will ſtay unſeaſonable hours at a tavern, even his entry into the houſe is accounted a treſpaſs: but refuſing to pay for what he calls for, will not make him a treſpaſſer; the publican's remedy here, is by an action of debt. In the caſe, however, of any irregularity of a landlord diſtreining for rent, it is enacted, That ſuch irregularities ſhall not make his firſt entry a treſpaſs, but the party injured ſhall have a ſpecial action of treſpaſs for the real ſpecific injury ſuſtained, unleſs tender of amends hath been made. In hunting foxes or badgers, though a man may juſtify going upon anothers ground, he cannot juſtify breaking the ground to dig them out. To prevent, however, vexatious and trifling actions of treſpaſs, as well as other perſonal actions, the law declares, That where the jury, who try an action of treſpaſs, give leſs damages than forty ſhillings, the plaintiff ſhall be allowed no more coſts than damages; unleſs it ſhall appear, that the treſpaſs was wilful and malicious, and it be ſo certified by the judge. Now every treſpaſs is held to be wilful, when the defendant has been forewarned of; and every treſpaſs malicious, though the damage given be leſs than forty ſhillings, where it plainly appears, that it was the defendant's intent to treſpaſs and vex the plaintiff. Full coſts are given againſt any inferior tradeſman, apprentice, or other diſſolute perſon convicted of a treſpaſs in hawking, hunting, fiſhing, or fowling upon another's land. And in this ſtatute it is held, that if a perſon be an inferior tradeſman, as for example, a clothier, it matters not what qualification he may have in point of eſtate: but, if he be guilty of ſuch treſpaſs, he ſhall be liable to pay full coſts.

III. The next ſpecies of real injuries to a man's lands is, by Nuiſance. Nuiſances are of two kinds, *public* and *private*; public we ſhall ſpeak of under public wrongs; at preſent, therefore, we will confine ourſelves to private nuiſances, of which there are ſeveral kinds: ſuch as may affect corporeal hereditaments, and ſuch as damage incorporeal ones.

1. With reſpect to corporeal hereditaments: if a man erects a building ſo cloſe to mine, as that his roof ſhall overhang mine, and throw the water on my roof, or ſhall obſtruct or darken ſuch of my windows as have exiſted time out of mind, it is a nuiſance, for which an action will lie; I ſay, time out of mind, for if my houſe be lately built, it was

folly in me to build ſo near the ground of another, on which he has as much right to erect a building as myſelf: I muſt plead therefore cuſtom, or ancient windows, to preſerve them from obſtruction. Keeping hogs, or other noiſome animals ſo near another's houſe as to ſtench the air, is a nuiſance; ſo is an offenſive trade, as a tanner's, tallow-chandler's, &c. which ſhould be exerciſed in ſome remote place. So if my neighbour neglects to fence or ditch, by which my lands are overflowed, it is alſo a nuiſance. It is likewiſe a nuiſance to ſtop or divert water that runs to another's meadow or mill; or to corrupt a watercourſe, by erecting a dye-houſe or a lime-pit in the upper part of the ſtream; in ſhort, to do any act that is injurious to my neighbour.

2. The ſame reaſon holds good in incorporeal hereditaments. If any one obſtructs the way to my grounds; or where I have a right to hold a fair or market, erects another ſo near me as to injure me: they are nuiſances: but, in the latter caſe, I muſt prove that my fair or market, is the elder one, and that the new fair or market is within ſeven miles of mine. So, erecting a ferry ſo near another antient ferry as to injure it, is a nuiſance, becauſe ferries, by preſcription, are bound to be kept up for the public uſe, on pain of the owner's being amerced for the neglect: and, it would be unjuſt to let a new ferry ſhare the profits which does not ſhare the burden: but where the reaſon ceaſes, the law alſo ceaſes, of courſe; it is no nuiſance to erect a mill ſo near another, as to draw away the cuſtom; unleſs it alſo intercepts or draws away the water. Neither is it any nuiſance to ſet up a ſchool or a trade in rivalſhip with another, for by ſuch emulation the public are like to be gainers.

As the law gives no private remedy but for a private injury, ſo no action will lie for a public nuiſance. The remedy in ſuch caſe is by indictment at the ſuit of the King, except where a private perſon receives ſome extraordinary injury by a public nuiſance; as if a gravel-pit or ditch be left open in a public way, and a man on horſeback fall therein; in which caſe an action for damages will lie. But, if a man takes upon himſelf to remove the nuiſance that offends him, he can have no action for it. An action on the caſe will recover damages for a nuiſance, but not remove it; however, as a continuance of a nuiſance is a freſh nuiſance, a freſh action will lie, if it be not removed, and more exemplary damages of courſe be given in a ſecond verdict than in the firſt: but if an ill-natured neighbour will be obſtinate enough rather to pay frequent damages and coſts than remove the nuiſance; the party grieved muſt have recourſe to a particular

lar writ, which, though ſubject to great delay, will, in the end, ſend the ſheriff with his *poſſe comitatus*, or power of the county, to level it.

IV. The next kind of injury to real property, is Waſte or deſtruction of the eſtate in houſes, woods, or lands, either by a voluntary demolition, or a neglect in repairing them.

1. Thoſe only are injured by waſte, who have ſome intereſt in the eſtate waſted. A man who has the abſolute fee-ſimple of the eſtate, without any incumbrance or charge upon it, may commit what waſte he pleaſes; but where a perſon has right of common in the place waſted, as a right of cutting and carrying away wood for firing or repairs; if the owner of the wood demoliſhes the whole wood, it is an injury to the commoner, and he can recover damages for this waſte, by an action on the caſe.

But he who is moſt hurt by waſte, is the reverſioner of an eſtate, after a term for life or years is expired: here, if the preceding holder of the land, whether it be tenant in dower or courteſy, or leſſee for life or years, if he was anſwerable for waſte at Common Law, and commits or ſuffers any, it is a manifeſt injury to him that has the inheritance, and he may ſue for and recover, damages. But he who hath the remainder for life only, cannot ſue for waſte, as he may never perhaps come into poſſeſſion, of courſe can ſuſtain no certain injury. Yet a rector, vicar, archdeacon, prebendary, and the like, who are ſeiſed or poſſeſſed, in right of their churches, of any reverſion, may hold an action of waſte, it being for the benefit of the church and their ſucceſſor.

Courts of equity will, on complaint, grant injunctions to ſtay waſte, till the defendant ſhall put in his anſwer, and the court ſhall thereupon make further order. Where tenants in common or joint-tenants commit waſte, either may bring an action of waſte againſt the other, compelling the defendant either to divide the eſtate and take the part waſted to himſelf, or to give ſecurity not to commit any further waſte; but the waſte here complained of muſt be ſomething conſiderable. On a writ of waſte, the plaintiff ſhall recover treble the damages aſſeſſed by a jury, from an inſpection of the waſte committed: and no defence ſet up that it was done by a ſtranger, ſhall acquit the defendant; the only thing given in evidence of uſe to the defendant, will be to prove that the diſtruction happened by lightning, tempeſt, the King's enemies, or other inevitable accident. If done by a ſtranger, the defendant may have an action againſt ſuch ſtranger, and ſhall recover the damages he has ſuffered in conſequence of it.

V. Subtraction is non-obſervance of any of thoſe conditions, by which a man holds his eſtate, ſuch as neglecting to ſwear fealty to the lord of the manor, to attend his courts, or to render the rent or ſervice reſerved; theſe are an injury to the freehold of the lord, by diminiſhing and depreciating the value of his ſeigniory.

The general remedy for all theſe is by diſtreſs, and the only remedy for the firſt two. For ſubtraction or with-holding of rents or ſervices, the remedy is by action of debt. With reſpect to leaſeholders, it is enacted, That where any tenant at rack-rent ſhall be one year's rent in arrear, and ſhall deſert the demiſed premiſes, leaving the ſame uncultivated or unoccupied, ſo that no ſufficient diſtreſs can be had; two juſtices of the peace (after notice affixed on the premiſes for fourteen days without effect) may give the landlord poſſeſſion thereof, and thenceforth the leaſe ſhall be void. In writs of aſſize for rent, or on a replevin, ſhould the tenant diſclaim or diſown his tenure, by which the lord would loſe his verdict; the lord may immediately have a writ of right, grounded on this denial of tenure, and ſhall, on proof of the tenure, recover back the land itſelf ſo holden, as a puniſhment to the tenant for ſuch his falſe declaimer.

Where a tenant in fee-ſimple pays more ſervices to the lord than he has a right to claim, through ſome former inadvertent payments either of himſelf or his anceſtors; he may, by a writ, remedy this injury by aſcertaining the ſervices and reducing them to their original ſtandard: but a tenant in tail may remedy ſuch an injury, owing to over payments of his anceſtors, by a plea to avowry in replevin. Where an under-tenant is diſtreined upon by the lord-paramount for the rent due to him by the meſne or middle lord, ſuch tenant ſhall be indemnified by the meſne lord; and if he does not make the ſatisfaction enjoined, he ſhall loſe his claim upon the tenant, and the tenant ſhall hold immediately of the lord-paramount himſelf.

So, to remedy the neglect of other ſervices, as to oblige the inhabitants of a certain ſpot to grind their corn at ſuch a mill; which was originally erected for their benefit; if ſuch ſervices can be proved by ancient cuſtom, damages may be recovered for non-obſervance of them: but, beſides theſe ſpecial remedies for ſubtraction, an action on the caſe will lie for them all, and entitle the injured party to a ſatisfaction.

VI. Diſturbance is the laſt we have to mention of real injuries, which is hindering or diſturbing the owners in the regular and legal enjoyment of certain incorporeal hereditaments. Of this

this injury there are five kinds: 1. diſturbance of franchiſes; 2. of common; 3. of wages; 4. of tenure; and, 5. diſturbance of patronage.

1. Diſturbance of Franchiſes is interrupting a man in the legal exerciſe of holding a court-leet, keeping a fair or maket, of free-warren, taking toll, ſeizing waifs, eſtrays, or in ſhort in doing any other thing he may have a privilege or franchiſe for. Prevailing on ſuitors not to appear at the lord's court, or any way preventing them; obſtructing the paſſage to a man's fair or market; hunting in his free-warren; refuſing to pay the accuſtomed toll, or the like, is conſidered as a diſturbance of franchiſe; for which the party grieved, by an action, ſhall recover damages; but for non-payment of toll he may, if he pleaſes, diſtrein.

2. Diſturbance of Common is interrupting or infringing upon a man's right of common; as by turning cattle on a common where we have no right; turning on improper or uncommonable cattle, where we have a right of common, as hogs or goats. But the lord, if it has been cuſtomary, may turn a ſtranger's cattle upon the common, or cattle that are not commonable. He may alſo make burrows and turn in rabbits, provided they are not ſuffered to increaſe ſo much as to deſtroy the common. In general, however, a ſtranger's and uncommonable cattle, if found on the land, may be diſtreined by the lord or the commoners: or if the injury be conſiderable, the commoner may recover damages by an action; if conſiderable, the lord only can bring an action, and that for the entry and treſpaſs.

Overſtocking a common is alſo a diſturbance; or turning in more cattle than we have a right to do: but this holds good only with limited commons; but even where commonage is without ſtint, there muſt be ſtill left ſufficient for the lord's own beaſts. For overſtocking, the lord may either diſtrein all above the number allowed, or may bring an action of treſpaſs; or he or any commoner may bring a ſpecial action on the caſe. To aſcertain what number every commoner has a right to turn on, the common may be proportioned by a writ of admeaſurement; and the rule is, that no commoner ſhall turn on more cattle, than his own land will, with the aſſiſtance of a common, ſupport. If a commoner overſtock the common a ſecond time, he ſhall, upon judgment being given againſt him, for ſuch ſecond ſurcharge, not only pay damages to the plaintiff, but forfeit ſuch ſupernumerary cattle turned on to the King.

Another injury falling under this head, is when the owner of the ſoil, or other perſon ſo encloſes or otherwiſe obſtructs the

common, that the commoner is thereby ſhut out from enjoying the benefit: which may be done by erecting fences, driving off the cattle, ploughing up the ſoil, or ſtocking it with rabbits in ſuch quantities as to deſtroy it. The uſual remedy in theſe caſes is by an action for damages. But the lord may encloſe and convert to the uſes of huſbandry any waſte grounds, woods, or paſtures, in which his tenants have common-appendant to their eſtates (that is, where the common is limited, and not without ſtint) provided he leaves ſufficient common to his tenants, according to the proportion of their land. No action ſhall lie againſt a lord for erecting on a common any windmill, ſheep-houſe, or other neceſſary buildings: and it is held, that the lord may make any other neceſſary improvements, though, by ſo doing, he even abridges the common, and makes it leſs ſufficient for commoners. And any lords of waſte and commons, with the conſent of the major part in number and value of the commoners, may encloſe any part thereof for the growth of timber and underwood.

3. Diſturbance in Ways is ſimilar to that of commons, it chiefly happening when any man's right to a way over another's gounds is by any means obſtructed, even by ploughing acroſs it. If it be a way annexed to his eſtate, and the obſtruction be made by the tenant of the land, it is a nuiſance, and may be remedied accordingly; but if the right of way, thus obſtructed by the tenant, be annexed only to a man's perſon, and unconnected with any lands or tenements; or if the obſtruction of a way belonging to a houſe or land is made by a ſtranger, it is then, in either caſe, a diſturbance only, and is to be remedied by an action for damages.

4. Diſturbance of Tenure is driving a tenant off an eſtate. For example: where a ſtranger, either by threats, or by any other means, contrives to drive away a tenant at will, off any lands or tenements, or even inveigles him to quit, the law conſiders it as an injury to the landlord of an atrocious nature, and will give him damages againſt the offender accordingly.

5. The laſt and moſt conſiderable ſpecies of diſturbance, is that of Patronage, which is obſtructing a patron in his preſentation to a living.

Where a perſon, that hath no right, preſents a clerk to a living, and that clerk be inſtituted; this is called a Uſurpation, and is a ſpecies of diſturbance: but if the real patron purſues his right, within ſix months after the avoidance or the living's becoming vacant, he ſhall recover his preſentation; if he neglects it in the ſix months, he ſhall, for the peace of the church and

for

for his own neglect, loſe the turn for that time, and without remedy.

The pretended patron then, the clerk preſented, and the biſhop inſtituting, may be diſturbers of patronage, and the law has given the injured patron an action for his relief.

On the vacancy of any living, the patron is bound, as we have ſeen, to preſent within ſix calendar months, or it will lapſe to the biſhop: on this preſentation, if the clerk be qualified, the biſhop is bound to inſtitute him. Where there is any diſpute about the right of preſentation, each party enters a *caveat* with the biſhop to ſuſpend inſtitution; for, in the ſpiritual courts, inſtitution, after a *caveat*, is void. If two preſentations be offered to the biſhop upon the ſame vacancy, the biſhop may ſuſpend the admiſſion of either clerk, ſuffering the living to lapſe; but if the patron or clerk on either ſide requeſt him to award a *jus patronatus*, he is obliged to do it: this is a commiſſion from the biſhop to his chancellor, to ſummon a jury of ſix clergymen and ſix laymen, to examine who is the real patron; and if upon ſuch examination and certificate returned thereof, he inſtitutes the clerk of that patron they return as the true one, the biſhop is no longer a diſturber, let the event turn out as it will.

The clerk refuſed by the biſhop may alſo have a remedy againſt him, by appeal to the court of his next immediate ſuperior, as from a biſhop to his metropolitan, and from the archbiſhop to the delegates.

## Chap. Fourth.

### OF REDRESS BETWEEN A SUBJECT AND THE CROWN.

HAVING conſidered the injuries that ariſe between ſubject and ſubject, we proceed next to thoſe between a ſubject and the crown.

Perſonal injuries to a ſubject, from the great diſtance between the people and the throne, can very *rarely* happen; indeed the law ſuppoſes, in decency, that they never *can* happen, and therefore has provided no remedy; injuries, however, to a ſubject's right of property may occur, but this muſt be through the officers of the crown, for whom the law, in matters of right, entertains no reſpect or delicacy.

The Common Law methods of obtaining poſſeſſion or reſtitution of property from the crown, are by petition or manifeſtation of right, both which may be proſecuted either in Chancery or the Exchequer. But the methods of redreſſing ſuch injuries as the crown may receive from a ſubject, are,

1. By ſuch Common Law actions as are uſual and conſiſtent with the royal prerogative.

2. Where the King hath indiſcreetly granted any thing by letters patent, which he ſhould not have done, or where the patentee hath done any thing to forfeit the grant, the patent may be repealed in Chancery.

3. The King can recover money or other chattels, or can obtain ſatisfaction in damages for any perſonal wrong committed in the poſſeſſions of the crown; as holding over after the determination of a leaſe; cutting down timber and the like, by an information filed in the Exchequer by the attorney-general, who then informs the court of the matter in queſtion, in which the party complained of is put to anſwer, and trial is had, as in ſuits between ſubject and ſubject. Mere matters of police and public convenience are uſually inforced by common informers, as the ſtatutes direct.

Having pointed out the nature of the ſeveral courts of juſtice, and ſhewn to which of theſe courts redreſs muſt be applied for, in every particular caſe: I ſhould now, in the laſt place, examine the manner in which the ſeveral remedies are purſued and applied by action; I mean the modern methods of practice in our courts of judicature: but as this is not of uſe to a general reader, being the profeſſional ſtudy of a lawyer, we will not ſwell the work with the detail. The practice of the court of Common Pleas, and which in all material points is the ſame with the practice of the court of King's Bench, and the Common Law part of the Exchequer, may be found in Gilbert's Hiſtory and Practice of the court of Common Pleas, by thoſe who are deſirous of ſtudying it.

# Chap. Fifth.

## OF TRIAL, JUDGMENT, EXECUTION, AND THEIR INCIDENTS.

I. TRIAL by jury has ever been eſteemed, in all countries, as a privilege of the higheſt and moſt beneficial nature. A thorough knowledge of it, therefore, cannot be unacceptable to every gentleman in the kingdom; and in explaining it, we will follow the order and courſe of its proceedings in the court of Common Pleas.

A writ is iſſued to the ſheriff to compel a jury to attend on the firſt day of the term, on pain of their lands and goods being by him diſtreined; or on the day when the judges open their commiſſions on their circuits. If the ſheriff be a party in the ſuit to be tried, or any way related or connected with either of the parties, ſo as not to be ſuppoſed quite impartial, he is not truſted to return or name the jury, but the writ iſſues to the coroner for that purpoſe; if any exception lies to the coroners, the writ is directed to two clerks of the court, or two perſons of the county named by the court, and ſworn; and theſe two ſhall indifferently name the jury, and their return is final, no challenge being allowed to their array.

We ſee here that the perſon appointing the jury, is a man of ſome fortune and conſequence; and, of courſe, ſuppoſed to be above committing wilful errors, and he is alſo bound by oath faithfully to perform his duty; and that he may not be ſuppoſed to ſummon an intereſted jury, if he has any intereſt or connection in the cauſe, he is not ſuffered to name them. After the jury is named, it is alſo ſome weeks before they are ſummoned, in which time the parties may enquire into their characters, connexions, &c. ſo that they may be challenged or excepted to upon juſt cauſe, and they are called upon to attend in their own neighbourhood, to avoid unneceſſary expences to them and to the witneſſes: and that the perſons trying the cauſe may not be ſuppoſed to be intereſted, and to prevent factions and parties, a judge of a ſuperior court is appointed for that purpoſe, who is a ſtranger in that part of the country; for to remove all ſuſpicion of partiality, it is wiſely provided by ſtatute, that no judge of aſſize ſhall hold pleas in any county where he was born, or inhabits.

Juries are either *ſpecial* or *common*. If the cauſe is of too delicate a nature for a jury of common freeholders to try, the ſheriff, upon a motion in court, and a rule granted thereon, is to attend the proper officer with his freeholder's book, and the officer is to take indifferently forty-eight of the principal freeholders, in preſence of the attornies on both ſides, who are each of them to ſtrike off twelve, and the remaining twenty-four are returned. This is called a ſpecial jury. And, either party is entitled, upon motion, to have a ſpecial jury ſtruck upon the trial of any iſſue, he paying the extraordinary expence, unleſs the judge will certify that the cauſe required ſuch ſpecial jury. A common jury contains not leſs than forty eight, nor more than ſeventy-two jurors: and their names, being written on tickets, are put into a box or glaſs; and when each cauſe is called, twelve of theſe perſons, whoſe names are firſt drawn, ſhall be ſworn upon the jury, unleſs abſent, challenged, or excuſed; or unleſs a previous view of the meſſuages, lands, or place in queſtion ſhall have been thought neceſſary; in which caſe ſix or more of the jurors returned, to be agreed on by the parties, or named by a judge, are appointed to have the matter in queſtion ſhewn to them, and then ſuch of the jury as have had the view, ſhall be ſworn on the inqueſt, previous to any other jurors.

As the jurors appear when called, they are ſworn, unleſs challenged by either party. In ſome caſes the array may be challenged; that is, the whole jury objected to; as for example, where there ſhall appear ſome partiality in the ſheriff or officer who named them, or if one of the parties to the ſuit be an alien, and a jury conſiſting of half foreigners be not returned agreeable to an act of parliament, which enacts that when either party is an alien born, the jury ſhall be one half denizens and the other aliens (if ſo many be forthcoming in the place) for the more impartial trial. But where both parties are aliens, the jury ſhall all be denizens. But in all caſes, challenges or exceptions may be made to particular jurors; as, if a lord of parliament be impannelled, either party may challenge him, or he may challenge himſelf; if a juryman be an alien born, or a bondſman; or if he have not a ſufficient eſtate, namely, ten pounds a year in England freehold or copyhold, and ſix pounds in Wales; or a leaſehold for five hundred years, or for any term determinable on life or lives of the clear yearly value of twenty pounds, over and above the rents reſerved; or in Middleſex, if he is not a leaſeholder of fifty pounds a year clear; or in London, or Weſtminſter, is not worth one hundred pounds. But when a

jury

jury conſiſts of half aliens and half denizens, no want of lands ſhall be cauſe of challenge to the alien, he being incapable of holding any. A juror may alſo be challenged for ſuſpicion of partiality, as that he is of kin to the party within the ninth degree; that he has been arbitrator on either ſide; that he is intereſted in the cauſe; that an action is depending between him and the party; that he has been bribed; that he has formerly been a juror in the ſame cauſe: that he is the party's maſter, ſervant, counſellor or attorney, or belongs with him to the ſame corporation or ſociety; that he is acquainted with the party or the like; the validity of which is left to the determination of two indifferent perſons, who are appointed by the court for that purpoſe. Particular crimes alſo will render a juror challengable; as where he has been convicted of treaſon, felony, perjury, or conſpiracy, or hath received judgment of the pillory, or to be branded, whipt, or ſtigmatized; or if he be outlawed or excommunicated, or hath been attainted of falſe verdict, *præmunire*, or forgery.

Certain men are exempted from the office of jurors, *viz.* ſick and decrepid perſons, perſons not reſident in the county, men above ſeventy years old, and under twenty-one; phyſicians and other medical perſons, counſellors, attornies, officers of the courts, and the like, and clergymen. When a ſufficient number is impannelled, they are ſeparately ſworn to try the iſſue between the parties, and to give a true verdict according to the evidence.

The jury are now ready to enter into the merits of the cauſe. which is opened to them by the counſel for the plaintiff, ſtating the caſe minutely, every thing that hath been done in the cauſe, which is now to be tried, and what evidence they have in their favour: this evidence is then examined, and when gone through, the counſel for the defendant opens the adverſe caſe, and ſupports it alſo by evidence; and then the party which began is heard, by way of reply.

To enter into the great variety of nice diſtinctions with reſpect to what evidence is allowed to be given in particular caſes, would be foreign to the deſign of this volume, which is not to form a lawyer, but to give a general reader a tolerable inſight into the laws and conſtitution of this country.

Let it ſuffice then to ſay, that there is one general rule obſerved in all trials, which is, that the beſt evidence the nature of the caſe will admit of ſhall always be required, if poſſible to be had; if not poſſible, then the next beſt evidence that can be had.

Witneſſes

Witneſſes are compelled to attend by a writ of *ſubpœna*, ſerved upon them, which commands them, laying aſide all excuſes, to appear at the trial, on pain of forfeiting one hundred pounds to the King, ten pounds to the party aggrieved, and damages equivalent to the loſs ſuſtained by want of ſuch evidence. But no witneſs, unleſs his reaſonable expences be tendered him, is bound to appear at all, nor when he appears, can he be compelled to give evidence, till ſuch charges are actually paid him; except he reſides within the bills of mortality, and is ſummoned to give evidence within the ſame. All witneſſes that have the uſe of their reaſon are competent and allowed to be examined, except ſuch as are informers, and not qualified for jurors, or are intereſted in the event of the cauſe. And no counſel, attorney, or other perſon intruſted with the ſecrets of the cauſe by the party himſelf, ſhall be compelled or perhaps allowed to give evidence of matters ſo intruſted to his ſecrecy: but he may be examined as to matters of fact, execution of deeds or the like, which might come to his knowledge without being ſo intruſted.

One witneſs (if credible) is ſufficient evidence of a ſingle fact, where no more are to be had; but no one can be witneſs in his own cauſe: and as a witneſs is ſworn to declare the *whole* truth; he is not to conceal any thing he knows, though he ſhould not be examined as to that point: and all this evidence is to be given openly in court before all parties, each party having liberty to object to it's competency, and to be allowed by a judge or not, in court. And if the judge, either in his directions or deciſions, miſtakes the law, either through ignorance, inadvertency, or deſign; the counſel, on either ſide, may require him publicly to ſeal a bill of exceptions, ſtating the point wherein he is ſuppoſed to err; which, if he refuſes, the party may have a compulſory writ againſt him to oblige him, if the fact alledged be duly ſtated: and if he returns, that the fact is untruly ſtated, when it is otherwiſe; an action will lie againſt him for making a falſe return. This bill of exceptions is in the nature of an appeal, examinable in the next immediate ſuperior court, upon a writ of error, after judgment given in the other court below. But the uſual way now is, for any miſdirection of the judge, to grant a new trial. Where a juror knows any thing of the matter in queſtion, he may be ſworn as a witneſs, and give his evidence in public court.

The evidence being gone through on both ſides, the judge, in open court, ſums up the whole to the jury, repreſenting the facts as they appeared to him, ſtating the evidence given, with his own remarks upon the ſubject, and giving them his opinion where

where any matter of law ariſes. The jury then, unleſs the caſe be very clear, withdraw from the court to conſider of their verdict.

II. The jury having brought in their verdict, and the trial being ended, next follows the judgement of the court upon what has paſſed; which, for certain cauſes, may either be ſuſpended or arreſted. For if any defect of juſtice happened at the trial, by ſurprize, inadvertency, or miſconduct; the party aggrieved may have relief in the court above, by ſuſpending the judgment, and obtaining a new trial; or if it appears that the complaint was either not actionable in itſelf, or not made with ſufficient accuracy, the party may ſuperſede it, by arreſting or ſtaying the judgment.

1. Caſes for a new trial, are want of notice of trial; any flagrant miſbehaviour of the party prevailing, towards the jury, which may have influenced them; where the judge certifies that the verdict is without, or contrary to, evidence, or that the damages given are too exorbitant; or where the judge has miſdirected the jury. But on a ſecond trial, if a new jury give a ſimilar verdict, a third trial is ſeldom awarded. Before however ſuch new trial is granted, counſel are heard, on both ſides, to impeach or eſtabliſh the verdict, and the court give their reaſons at large, why a freſh examination ought, or ought not, to be allowed.

2. Arreſts of judgment may be obtained for any informality in the proceedings; but if the judgment is not arreſted within the firſt four days of the next term after trial, it is then too late.

Where a defendant, in an action brought againſt him, puts in no plea to ſtop the progreſs of the ſuit, or acknowledges the plaintiff's demand to be juſt; or when the defendant's attorney declares he has no inſtructions to ſay any thing in defence of his client; the plaintiff will obtain judgment by default, without the intervention of a jury: and if any of theſe happen in actions where the ſpecific thing uſed for is recovery, as in actions of debt for a ſum certain, the judgment is complete and final (as it always is, where judgment is given for the defendant). And therefore it is cuſtomary in borrowing of money, in order to ſtrengthen the lender's ſecurity, for the borrower to execute a warrant of attorney to ſome attorney named by the lender, empowering him to confeſs a judgment by any of the ways juſt now mentioned, in an action of debt brought by the lender againſt the borrower for the ſpecific ſum due; which judgment, when confeſſed, is abſolutely binding and final. But where damages are to be recovered, a jury muſt be called in to aſſeſs them before

jore a judge, unleſs the defendant, to ſave expences, will confeſs the whole damages laid or ſet forth in the plaintiff's ſtate of his caſe.

Coſts naturally follow judgments, which are taxed and moderated by the proper officer of the court. But the King, and any perſon ſuing to his uſe, ſhall neither pay nor receive coſts; and the Queen conſort participates of the ſame privilege. Executors and adminiſtrators, ſuing in right, of the deceaſed, are alſo exempted from coſts, if verdicts are given againſt them; and paupers, when plaintiffs, ſwearing themſelves not worth five pounds. Theſe are to have original writs and ſubpœnas *gratis*, and counſel and attorney aſſigned them without fee; and are excuſed paying coſts when plaintiffs; for the counſel and clerks are bound to give their labour to *him* but not to his antagoniſts. To prevent trifling actions for words, aſſaults, battery, or treſpaſs, it is enacted, that where the jury ſhall give leſs damages than forty ſhillings, the plaintiff ſhall be allowed no more coſts than damages, unleſs the judge before whom the cauſe was tried ſhall certify that an actual battery (and not an aſſault) was proved, or that in treſpaſs the freehold or title of the land came chiefly in queſtion.

Judgment being entered, execution immediately follows, unleſs the party condemned proceeds to reverſe it, by a writ in the nature of appeal.

Proceedings in nature of appeals are, 1. The writ of deceit; and, 2. A writ of error.

1. An action, in the nature of a writ of deceit, may be brought in the court of Common pleas, to reverſe a judgment there had, by fraud or colluſion in a real action: of this, however, enough has been obſerved before.

2. But the principal redreſs on theſe occaſions, is by a writ of error in ſome ſuperior court. He that brings the writ muſt generally find ſubſtantial bail as a ſecurity to proſecute, and for ſecuring payment of coſts and damages to the defendant, in caſe of non-ſucceſs. Courts of appeal may, on hearing the matter, reverſe or affirm the Judgment of the inferior courts, but none are final except the Houſe of Peers.

III. If judgment be not ſuſpended or arreſted by any of the methods before-mentioned, the laſt ſtep is carrying that judgment into execution. Now execution is performed in different ways.

If poſſeſſion of land be awarded to the plaintiff by judgment, a writ iſſues to the ſheriff, commanding him to give the plaintiff actual poſſeſſion; and will juſtify his breaking open doors if neceſſary;

neceſſary; but if poſſeſſion be quietly yielded up, the delivery of a twig or a turf, in the name of poſſeſſion, is ſufficient execution. On the recovery of a preſentation to a benefice, the execution is by a writ directed to the biſhop or archbiſhop, requiring him to admit and inſtitute the plaintiff's clerk.

In other judgments, where ſomething is to be done by the defendant, a ſpecial writ of execution iſſues to the ſheriff to ſee it done. In caſes of nuiſance or indictment, the ſheriff is to ſee them removed at the charge of the defendant. On a replevin, the diſtreſs is to be returned, but if the diſtreſs be not forthcoming, the party muſt either ſubmit to a fine, pay damages, or be impriſoned. In detinue after judgment, the defendant ſhall be compelled to deliver the goods, or pay the value, by repeated diſtreſſes of his chattles.

Executions, in actions where money only is recovered, as a debt or damages, are againſt the body, lands, and goods of the defendant.

1. The debtor may be impriſoned till ſatisfaction be made for debt, coſts, and damages, unleſs ſuch debtor be a privileged perſon, an executor or adminiſtrator, or ſuch other perſon as could not originally be held to bail: if an action be brought againſt the huſband and wife, in execution, both of them ſhall be taken into cuſtody; but if brought only againſt the wife, when ſingle, and ſhe marries during the ſuit, ſhe only ſhall be taken. But if judgment be recovered againſt a huſband and wife, for the contract of the wife or her perſonal miſbehaviour during coverture, the huſband only ſhall be impriſoned.

When a man's perſon is once taken in execution, he cannot regain his liberty till he makes ſatisfaction; and no other proceſs can be ſued out againſt his lands or goods; only, if the defendant dies while in confinement, the plaintiff may, after his death, ſue out a new execution againſt his lands, goods, or chattles. When a man is impriſoned on this account, if the keeper ſuffers him to go at large, (though for a time only), he never can take him (though the plaintiff may) and the ſheriff is bound to pay the debt: but if he eſcapes without the keeper's knowledge, provided the ſheriff can retake him before any action be brought againſt the ſheriff, he ſhall not be obliged to pay the debt. A reſcue of a priſoner in execution will not exempt the ſheriff. But, if a defendant, charged in execution for any debt leſs than one hundred pounds, will ſurrender all his effects to his creditors (except his apparel, bedding, and tools of his trade, not amounting in the whole to the value of ten pounds) and will make oath of his punctual compliance with the

the ſtatutes, the priſoner may be diſcharged, unleſs the creditor inſiſts on detaining him; in which caſe he ſhall allow him two ſhillings and four-pence per week, to be paid on the firſt day of each week, and on failure of regular payment the priſoner ſhall be diſcharged. Yet the creditor may, at any future time, having execution againſt the lands and goods of the defendant, though never more againſt his perſon. And on the other hand, the creditors may, as in bankruptcy, compel (under pain of tranſportation for ſeven years) ſuch debtor charged in execution for any debt under an hundred pounds to make a diſcovery and ſurrender of all his effects for their benefit; whereupon he is alſo entitled to the diſcharge of his perſon.

If the defendant cannot be found, the plaintiff may ſue out a proceſs againſt the bail, if any were given; and in caſe ſatisfaction is not made, and the defendant does not ſurrender on the day of the return, the plaintiff may have judgment againſt the bail, and execution againſt them.

2. Execution may alſo be had againſt the defendant's goods and chattels, and herein privileged perſons are no more exempt, than others, nor executors or adminiſtrators, with regard to the goods of the deceaſed. The ſheriff may not break open any outer doors to execute his writ on either the goods or the perſon of the defendant; but muſt enter peaceably: and may then break open any inner door belonging to the defendant, in order to ſeize the goods and chattels. Theſe he may ſell (even an eſtate for years, which is a real chattel) till he has raiſed enough to ſatisfy the judgments and coſts; firſt paying the landlord of the premiſes on which the good are found, the arears of rent then due, not exceeding one year's rent in the whole. If part of the debt only be recovered this way, the plaintiff may take the defendant's body for the remainder.

3. Execution will lie alſo againſt a man's goods and the profits of his lands; whereby the ſheriff may ſeize all his goods, and receive the rents and profits of his lands till ſatisfaction be made. Where execution is to go againſt an eccleſiaſtic, who has no lay-fee, but is beneficed, a writ is ſent to the biſhop of the dioceſe, who thereupon ſequeſters the profits of his living, and directs the churchwardens to collect the ſame, and pay them to the plaintiff till the full ſum be raiſed. In ſhort, by Common Law, a man's body and goods, may, by certain writs, be taken in execution, upon any judgment; ſo may his lands and goods, but not his body and land. But upon ſome proſecutions given by ſtatute, as in the caſe of recognizances or debts acknowledged on ſtatutes-merchant or ſtatutes-ſtaple; upon forfeiture

feiture of theſe, the body, lands, and goods may all be taken in execution at once, to compel the payment. For a debt due to the King, execution or judgment may be ſued out againſt body, goods, and land, and the King's debt ſhall be paid in preference to that of any other creditor who hath not obtained judgment, before the King's ſuit commenced. The King's judgment alſo affects all lands, which the King's debtor hath at or after the time of contracting his debt, or which any of his officers mentioned in 13 Eliz, c. 4. both at or after the time of entering on his office: ſo that if ſuch officer of the crown ſells his land for its value, that land, even in poſſeſſion of the purchaſor, ſhall be liable to the King's debt; though the debt due to the King was contracted by the vendor many years after the ſale of his lands: whereas between ſubject and ſubject, a judgment ſhall not bind land in the hands of a *bona fide* purchaſor, but only from the time of actually ſigning the ſame; nor goods in the hands of a ſtranger or purchaſor, but only from the actual delivery of the writ to the ſheriff. But all writs of execution muſt be ſued out within a year and a day after the judgment is entered, or the court will conclude that the judgment is ſatisfied and extinct. Yet, however, the judgment may be revived, or the plaintiff may ſtill bring an action of debt founded on this dormant judgment.

## Chap. Sixth.

### OF PROCEEDINGS IN THE COURTS OF EQUITY.

HAVING gone through that redreſs of wrongs afforded by the Common Law courts, we have now to conſider the proceedings in equity; of which I ſhall endeavour to give the reader ſome general idea, without entering into all the *minutiæ* of practice. The ſame juriſdiction is exerciſed and the ſame ſyſtem of redreſs purſued in the equity court of Exchequer.

The only diſtinction between the courts of Equity and the courts of Common Law, are in the mode of proof, the mode of trial, and the mode of relief. A court of equity obliges the parties to anſwer upon oath; and will admit of evidence by depoſition taken in writing; ſo that the attendance of witneſſes in court is excuſed, and with reſpect to relief, it is more ſpecific,

fic, than in the courts of Common Law. In executing agreements, a court of equity will compel them to be carried into ſtrict execution, where it is not improper or impoſſible, inſtead of giving damages for their non-performance. In waſte and other ſimilar injuries, equity will order them to be prevented by injunction; it will ſtop proceedings of law; it will ſet aſide fraudulent deeds, decree re-conveyances, and direct an abſolute conveyance merely to ſtand as a ſecurity. In ſuch matters only lies the diſtinction between courts of Equity and courts of Common Law. In all other reſpects they are the ſame; it being a maxim that equity follows the law, and by no means reſts in the breaſt of the Chancellor.

The commencement of a ſuit in Chancery, is by bill to the Chancellor in the form of a petition, praying that he will compel the defendant to anſwer upon oath, to all the matter charged in the bill; and if it be to ſtop proceedings at law, to prevent waſte and the like, it prays that he will iſſue an injunction, commanding the defendant to ceaſe.

When the bill is filed, where an injunction is prayed for, upon a proper caſe ſupported by affidavits, it is generally granted, and to continue till the defendant has put in his anſwer; which is to be done upon oath: but, if a peer or peereſs anſwers, it is only upon their honour; and when the anſwer comes in, whether the injunction ſhall continue or not till the hearing of the cauſe, is determined by the court, upon argument of counſel drawn from conſidering the anſwer and affidavit together.

But in common bills, as ſoon as they are filed, a writ of *ſub-pœna* is taken out, commanding the defendant to appear and anſwer the bill within a limited time, on pain of one hundred pounds. If this is not done, an attachment iſſues to the ſheriff to take him into cuſtody, and bring him into court. If he is not to be found, after a certain proceſs, a ſequeſtration iſſues to ſeize all his perſonal eſtate, and the profits of his real, and detain them, ſubject to the order of the court; this done, the plaintiff's bill is ſuppoſed to be admitted by the defendant, and a decree is made accordingly.

Should the defendant be taken, he is committed to priſon, till he obeys the orders of the court, for which he is attached, and pays the plaintiff ſuch coſts as he has thus incurred.

As a body corporate cannot be attached, the proceſs is to diſtrein their goods and chattels, rents and profits, till they obey. If a peer be the defendant, the Lord Chancellor ſends a letter to him to requeſt his attendance, together with a copy of the bill: and if he neglects to appear, he may then be ſerved with

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a *ſubpæna*, which is followed, if on further contempt, with a ſequeſtration againſt his lands and goods. The ſame proceſs iſſues againſt a member of parliament, except that the Lord Chancellor ſends him no letter.

Should the defendant appear, if he cannot ſet aſide the bill, by any plea in bar, he muſt anſwer it on oath, if the plaintiff requires it; but this is not always done; but ſhould any queſtions be aſked in the bill that ſeeks diſcovery of any thing which may occaſion a forfeiture of any kind, or may convict a man of any crime, the defendant may demur to the bill, and refuſe to anſwer.

If the plaintiff finds in the defendant's anſwer ſufficient matter to proceed on, he may go on to a hearing by proving his facts, which is done by the examination of witneſſes, and taking down their depoſitions in writing.

If witneſſes are old or in a bad ſtate health, it is very uſual to file a bill, to preſerve the teſtimony of ſuch witneſſes, though no ſuit is depending; for perſons may wait the death of ſuch people to begin their ſuit. This generally happens in the caſe of wills, and is called proving a will in Chancery.

When all the witneſſes are examined, copies of their depoſitions may be had by all parties, and the cauſe when ready for hearing, may be brought on either before the Chancellor or the Maſter of the Rolls. Decrees made by the Maſter of the Rolls, except ſuch as by the courſe of the court were appropriated to the great ſeal alone, ſhall be valid; ſubject nevertheleſs to be diſcharged or altered by the Lord Chancellor, and ſo as they ſhall not be inrolled, till the ſame are ſigned by his lordſhip. Either party may be *ſubpæna'd* to hear judgment on the day fixed for the hearing, when, if the plaintiff does not attend, his bill is diſmiſſed or thrown out with coſts; or if the defendant does not attend, a decree will be made againſt him, which will be final, unleſs he pays the plaintiff's coſts of attendance, and ſhews good cauſe for his non-attendance. A plaintiff's bill may alſo be diſmiſſed, on a nonſuit at law, if he ſuffers three terms to elapſe, without making ſome progreſs in the cauſe.

Coſts do not here follow the decree, as they do judgments in Common Law, of courſe; but are given diſcretionally, as the circumſtances of the caſe appear more or leſs favourable to the vanquiſhed party.

All accounts and intricacies are referred on the firſt hearing (for there is generally more than one) to a maſter in Chancery to examine; which examination frequently laſts for years, and

ſuch

ſuch maſter reports to the court the facts as they appear to him. Hence it is that Chancery ſuits are often of ſo long duration.

When a final decree is made, it is enforced, if neceſſary, by a commitment of the perſon, or a ſequeſtration of the party's eſtate; but if by this decree either party thinks himſelf aggrieved, and it is not inrolled, he may, by petition to the Chancellor, ſigned by two counſel, have a re-hearing, when even new evidence may be read; but after the decree is once ſigned and inrolled, no re-hearing can be had, except by bill of review or appeal to the Houſe of Lords.

A bill of review may be had on a manifeſt error in judgment's appearing on the face of the decree, or, with leave of the court, where new evidence comes out, that could not poſſibly be had at the time the decree was made; but not otherwiſe.

An appeal to the Houſe of Lords is by petition; but no new evidence is there admitted. On hearing the former evidence, the Lords either affirm or reverſe the decree. This is the *dernier reſort*.

# BOOK IV.

# ON PUBLIC INJURIES.

## Chap. First.

### OF CRIMES AND CRIMINALS IN GENERAL.

IN treating of crimes and miſdemeſnors, we will conſider their nature, with the ways of preventing and puniſhing them; who are exempted from puniſhment in criminal caſes; the ſeveral degrees of guilt in criminals; the different ſpecies of crimes, with their puniſhments; and the method of inflicting theſe puniſhments: and the firſt three we will treat of in this chapter.

Such a knowledge of the criminal law as we are now going to lay before the reader, that is, the nature, extent, and degrees of every crime, with the penalties annexed, is of the greateſt importance to every individual; and no ſituation in life, no integrity of heart, or circumſpection of conduct, ſhould place a man above conſidering what is forbidden by the laws of his country, and to what deplorable circumſtances a wilful diſobedience may expoſe him.

I. A crime then, or miſdemeſnor, is the commiſſion or omiſſion of an act, in oppoſition to a public law, either forbidding

or

or enjoining it. In common uſe of the words, crimes denote great offences; miſdemeſnors, faults and omiſſions.

II. For the commiſſion of acts for which ſome perſons would be puniſhed, there are others exempted, *viz.* 1. Thoſe who commit them involuntarily or without any malicious deſign; for example, idiots, lunatics, and infants. 2. Thoſe who commit them by accident; and, 3. Thoſe who commit them thro' neceſſity or compulſion. We will enter more minutely into each.

1. Infants, under the age of diſcretion, from ignorance, cannot be deſerving of puniſhment. But what is this age of diſcretion? The law of England does in ſome caſes privilege a minor under twenty-one, as to common miſdemeſnors: ſo as to eſcape fine, impriſonment, and the like; and particularly in caſes of omiſſion, not repairing bridges, highways, *&c.* not having his fortune at command, he is ſuppoſed incapable of doing as he would; but in riots, battery, and breaches of the peace, a minor, above the age of fourteen, is as liable to ſuffer, as a perſon of twenty-one,

With reſpect to capital crimes, the capacity of doing ill is not ſo much meaſured by a boy's age, as by his underſtanding; the maxim is, that cunning ſhall compenſate for want of years. Under ſeven years of age, an infant cannot be guilty of felony; but at eight he may: and if it ſhall appear to a jury that an infant under fourteen is capable of diſcerning good from evil, he may be convicted and ſuffer death.

Lunatics and idiots are excuſed, as not knowing what they are about. If a man in ſound mind commits a capital offence, and before arraignment loſes his ſenſes, he ſhall not be arraigned, becauſe not able to plead in his own behalf; nay, if he becomes mad after he is found guilty, and condemned, execution ſhall be ſtayed; as, was he not inſane, he might alledge ſomething in ſtay of execution: beſides, the execution of a madman would be no example to others, which is the end of puniſhment. If there be any doubt, whether the criminal be inſane or not, it ſhall be tried by a jury; but, a lunatic, with lucid intervals, ſhall anſwer for what he does in thoſe intervals, as if he had no deficiency. And, if a perſon, who wants diſcretion, commits a treſpaſs againſt the perſon or poſſeſſion of another, he ſhall be compelled in a civil action to give ſatisfaction for it.

Drunkenneſs has been looked upon as a temporary madneſs; but, this will be no excuſe for criminal conduct.

2. Thoſe

2. Thoſe who commit unlawful acts by accident are always acquitted. Where it affects the life, we ſhall ſpeak of it hereafter; but, in other matters, where any accidental miſchief happens to be the conſequence of a *lawful* act, the party is excuſed; but, if he be doing an *unlawful* act, and ſhould chance to kill a man, or the like, in ſo doing; his want of foreſight ſhall not exempt him from puniſhment.

Ignorance or miſtake falls under this head: that is, when a man intending to do a lawful act, commits one that is unlawful. If this ariſe from ignorance or miſtake of fact he ſtands excuſed; but not ſo, if from error in point of law. If a man deſigning to kill a houſe-breaker, in his own houſe, by miſtake kills one of his own family, he is not criminal; but, if he thinks he has a right to kill an outlaw, and does it, it is murder; for the laws of one's country every one is bound, and preſumed, to know.

3. Such as commit unlawful acts through neceſſity or compulſion, are alſo excuſed: a woman committing ſome crimes under the conſtraint of her huſband, ſhall ſtand excuſed. But neither a ſon nor a ſervant can plead the command or compulſion of a parent or maſter. If a woman commits theft, burglary, or other civil offences, by the command of her huſband, or even in his company, which the law ſuppoſes a command, ſhe will eſcape puniſhment. But no plea of a huſband's command ſhall excuſe a woman guilty of treaſon, or murder. And a wife may be indicted and ſet in the pillory with her huſband, for keeping a brothel, being an offence generally conducted by the intrigues of the female ſex: and, in all caſes, where a wife, acts ſingly, without the company or coercion of her huſband, ſhe is as much reſponſible for her actions, as if ſhe was a ſingle woman.

In time of war and rebellion, a man is juſtified in doing many treaſonable acts by compulſion of the enemy and rebels, which in time of peace would admit of no excuſe. But this will hold good only in human laws. According to divine law, no compulſion ſhould make a man do an immoral act: and therefore, though a man could not eſcape even death, but by killing an innocent man; this fear, in the eye of Heaven, would not acquit him of murder; for, he ought rather to forfeit his own life, than take away that of an innocent perſon. In ſuch caſe, he might kill the aſſailant, and herein would he be juſtified.

So again, there are inſtances where, in the commiſſion of crimes, a man's will is rather paſſive than active; as where, in

the choice of two evils ſet before him, and compelled to adopt one, he chooſes the leaſt pernicious. For example; where a man is obliged to wound or kill another, when reſiſtance is made to the execution of his office: as, in taking up a capital offender or diſperſing a riot. His office and the good of ſociety here will juſtify the act.

III. Next, for the ſeveral degrees of guilt in criminals. In the commiſſion then of a crime, a man may be either *principal* or *acceſſory*.

1. As principal, whether committing the fact, or the being preſent and aſſiſting when it is done. Being preſent does not always imply being in the ſight or hearing of, but a man is deemed to be preſent, if, while another is committing a robbery, he keeps watch at a proper diſtance. So, in the caſe of murder by poiſoning. If a man prepares and lays the poiſon; or perſuades another to drink it, who is ignorant of its poiſonous quality; or gives it to him for that purpoſe, he is as much a principal in the murder, as if he had adminiſtered the potion. So, laying a trap for another; letting out a wild beaſt with an intent to do miſchief; exciting a madman to commit murder, of which death is the conſequence; in all theſe caſes, the party offending is a principal.

2. An acceſſory is one who is either *before* or *after* the crime committed, ſome way concerned in it, though he ſhould neither be the chief actor, nor be preſent when it was done. Let us ſee then what offence admit of acceſſories *before* the fact and *after* it, and how they are to be treated.

In high-treaſon, all are deemed principals; but, in petit treaſon, murder, and felonies of all ſorts, there may be acceſſories, except in thoſe offences that are ſuddenly committed, as manſlaughter and the like, which of courſe can have no acceſſories *before* the fact. In crimes under the degree of felony, the law deems all that are concerned therein principles. An acceſſory, however, cannot be guilty of a higher crime than his principal. For example; if a ſervant inſtigates a ſtranger to kill his maſter, the ſervant, though an acceſſory, is, equally with the ſtranger, guilty of murder: but, if the ſervant be preſent when he is killed, he will be a principal; of courſe, guilty of petit treaſon, and the ſtranger will be guilty of murder.

An acceſſory *before* the fact, is one who, though abſent at the commiſſion of a crime, doth procure, counſel or command another to commit it. He who any ways commands or adviſes another to commit an unlawful act, is acceſſory to all the conſequences of that act; but not to any act diſtinct from that

act he adviſed him to commit. For inſtance, if *A* adviſes *B* to beat *C*, and *B* beats him ſo that he dies, *B* is guilty of murder, and *A*, as acceſſory: but if *A* commands *B* to burn *C*'s houſe, and *B*, in ſo doing, robs it: *A*, though acceſſory to the burning, is not acceſſory to the robbery. But if the felony committed be of the ſame nature, only varying in circumſtances; as if *A* commands *B* to poiſon *C*, and B ſtabs him or ſhoots him, *A* is ſtill acceſſory; the nature of the thing commanded being the death of *C*, though the manner or circumſtances of its execution varied.

In all caſes where an act of parliament enacts an offence to be felony, though it mentions nothing of acceſſories before or after; yet thoſe that counſel or command the offence, are acceſſories *before*, and thoſe that knowingly receive the offender are acceſſories *after*: but when the ſtatutes expreſsly mention only procurers, counſellors, or abettors: that is, acceſſories *before*, acceſſories *after* are not included.

Statutes excluding the principals from the benefit of clergy, do not thereby exclude the acceſſories *before* or *after*; neither doth a ſtatute excluding acceſſories, thereby exclude the principals.

An acceſſory *after* the fact, is, when a perſon knowing a felony to have been committed, receives, relieves, and ſhelters the felon. Any aſſiſtance given to prevent the felon's being apprehended, tried, or puniſhed, makes the aſſiſter an acceſſory; as furniſhing a means to eſcape, giving him victuals or money to ſupport him; finding him a place of ſhelter: protecting or reſcuing him, or conveying inſtruments to enable him to break out of priſon. But relieving him in priſon with cloaths and other neceſſaries is no offence. Buyers and receivers of ſtolen goods, knowing them to be ſtolen, are alſo acceſſories, and may be tranſported for fourteen years; and buying goods at an under value is a preſumptive evidence, that they were known to be ſtolen. Receiving of linen ſtolen from bleaching-grounds is a capital offence.

If one commit a felony, and come to a perſon's houſe before he be arreſted, and ſuch perſon ſuffer him to eſcape without arreſt, knowing him to have committed a felony, this doth not make him acceſſory: but if he take money of the felon to ſuffer him to eſcape, this makes him acceſſory: and ſo it is, if he ſhuts the fore-door of his houſe, whereby the purſuers are deceived, and the felon hath opportunity to eſcape, this makes him an acceſſory: it not being the omiſſion to apprehend him, but his aſſiſting to the eſcape, that conſtitutes the crime.

But the felony muſt be complete at the time of the aſſiſtance given, or the aſſiſtant is not an acceſſory. If *A* wounds *B* mortally, and after the wound given, but before *B* dies, *C* receives and ſhelters *A*; *C* is not acceſſory; for till *B* dies, no felony is committed: but where a felony is complete, ſo ſtrict is the law to do effectual juſtice, that if a parent receives and aſſiſts his child, or a child his parent, or even if the huſband relieves his wife, who have either of them committed felony, the receivers become acceſſories after the fact. But a married woman concealing her huſband does not become an acceſſory by ſo doing, ſhe being bound not to diſcover her lord.

If a wife alone, the huſband being ignorant of it, receives a felon, the wife is acceſſory and not the huſband: but if the huſband and wife both receive him knowingly, it ſhall be adjudged only the act of the huſband.

Acceſſories *after* the fact are allowed the benefit of clergy, (which the reader will find explained hereafter) in all caſes, except in horſe-ſtealing, and ſtealing linen from bleaching-grounds, which is denied to principals and acceſſories *before* the fact in many caſes, as, among others, in petit treaſon, murder, robbery, and wilful burning. It is doubted whether, if a man be acquitted as principal, he can be afterwards indicted as an acceſſory *before* the fact, theſe offences being ſo nearly allied in guilt; but it is clearly held, that one acquitted as principal, may be indicted as an acceſſory *after* the fact, this being a ſpecies of guilt ſo very different.

## Chap. Second.

### OF THE DIFFERENT SPECIES OF CRIMES.

IN every well-ordered ſociety, crimes are eſtimated in proportion to the miſchief they do; of courſe, private vices, or the breach of mere abſolute duties, are not the objects of municipal law, any further than as they tend, by their bad example, to corrupt the morals of the public. Drunkenneſs, for inſtance, if committed privately, is beyond the reach of human laws; but if committed publicly, its bad example makes it liable to temporal cenſures.

Or

On the other hand, there are ſome miſdemeſnors puniſhable by the law of the land, that are not in themſelves criminal; but are made unlawful, for the benefit of the public, ſuch as poaching, exportation of wool, and the like.

In ranging the ſeveral offences, then, puniſhable by the laws of this country, I will begin with thoſe more immediately levelled at God and religion: I will next proceed to ſuch as violate the law of nations; after this, to thoſe that ſtrike at the King and his government; then to ſuch as infringe the rights of the public; and, laſtly, to thoſe which injure individuals.

I. Firſt then for thoſe crimes or miſdemeſnors more immediately levelled at God and religion, and of theſe there are eleven; viz. 1. Apoſtacy; 2. Hereſy; 3. Reviling of ordinances; 4. Non-conformity; 5. Blaſphemy; 6. Swearing; 7. Religious impoſitions; 8. Simony; 9. Sabbath-breaking; 10. Drunkenneſs; and, 11. Lewdneſs. The firſt four are more immediately levelled at the eſtabliſhed religion, the reſt at God and morality.

1. Apoſtacy is a total renunciation of chriſtianity, by embracing either a falſe religion, or no religion at all. If any perſon educated in, or having made profeſſion of, the chriſtian religion, ſhall, by writing, printing, teaching, or adviſed ſpeaking, deny the chriſtian religion to be true, or the holy ſcriptures to be of divine authority, he ſhall, upon the firſt offence, be rendered incapable of holding any office or place of truſt; and for the ſecond, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaſer of lands, and ſhall ſuffer three years impriſonment without bail; but to give room for repentance, if, within four months after the firſt conviction, the delinquent will, in open court, publicly renounce his error, he ſhall be diſcharged, for that once, from all his diſabilities.

2. A ſecond offence of this kind is hereſy; which conſiſts of a denial of ſome of the eſſential doctrines of chriſtianity, and which is liable to the cenſures of the eccleſiaſtical courts; but the legiſlature hath ſo far interpoſed, with reſpect to one ſpecies of hereſy, as to declare, That if any perſon, educated in the chriſtian religion, or profeſſing the ſame, ſhall, by writing, printing, teaching, or adviſed ſpeaking, deny any one of the perſons in the holy Trinity to be God, or maintain that there are more Gods than one, he ſhall undergo the ſame penalties and incapacities, as for apoſtacy.

3. Reviling the ordinances of the church is a third offence. Whoever reviles the ſacrament of the Lord's ſupper, ſhall be

puniſhed by fine and impriſonment; and if any miniſter ſhall ſpeak any thing in derogation of the book of Common Prayer, he ſhall, if not beneficed, be impriſoned one year for the firſt offence, and for life, for the ſecond: and if he be beneficed, he ſhall, for the firſt offence, be impriſoned ſix months, and forfeit a year's value of his benefice; for the ſecond offence he ſhall be deprived, and ſuffer one year's impriſonment, and for the third, ſhall, in like manner, be deprived, and ſuffer impriſonment for life. And if any perſon, in plays, ſongs, or other open words, ſpeak any thing in derogation, depraving, or deſpiſing of the ſaid book, or ſhall openly prevent the reading of it, or cauſe any other ſervice to be uſed in it's ſtead, he ſhall forfeit for the firſt offence a hundred marks; for the ſecond, four hundred; and, for the third, ſhall forfeit all his goods and chattels, and ſuffer impriſonment for life.

Alſo ſeditious words, in derogation of the eſtabliſhed religion, are indictable, as tending to a breach of the peace. No perſon ſhall have any benefit of the toleration act, who ſhall deny, in his preaching or writing, the doctrine of the bleſſed Trinity. If any perſon ſhall in any ſtage-play, interlude, ſhew, may-game, or pageant, jeſtingly or profanely ſpeak or uſe the holy name of God or Chriſt Jeſus or of the Holy Ghoſt, or of the Trinity, he ſhall forfeit ten pounds, half to the King and half to him that ſhall ſue.

4. Nonconformity to the worſhip of the church of England, is another offence. Nonconformiſts are of two ſorts: thoſe who abſent themſelves from divine ſervice, and attend the ſervice of no other perſuaſion; and thoſe who offend through a miſtaken or perverſe zeal, as papiſts and diſſenters. The firſt forfeit one ſhilling to the poor every Sunday they ſo abſent themſelves, and twenty pounds to the King, if they abſent for a month together; and if they abſent from their own pariſh-church, they ſhall prove where they go to church. And if they keep an inmate in their houſes ſo irreligiouſly diſpoſed, they forfeit ten pounds a month. With reſpect to proteſtant diſſenters; no penal laws made againſt popiſh recuſants (except the teſt acts) ſhall extend to any diſſenters, other than papiſts, and ſuch as deny the Trinity: provided, 1. That they take the oaths of allegiance, and ſupremacy (or being Quakers make a ſimilar affirmation) and ſubſcribe the declaration againſt popery; 2. That they repair to ſome congregation certified to and regiſtered in the court of the biſhop or archdeacon, or at the county ſeſſions; 3. That the doors of ſuch meeting-houſes ſhall be unlocked, unbarred, and unbolted; in default of which, the perſons meeting there,

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are ſtill liable to all the penalties of the former acts. Diſſenting teachers, in order to be exempted from the penalties on the ſtatutes, are alſo to ſubſcribe the articles of religion, with an expreſs exception of thoſe relating to the government and powers of the church, and to infant baptiſm. Thus all perſons, except papiſts and oppoſers of the Trinity, are at full liberty to act according to their own conſciences in matters of religious worſhip. And it is alſo enacted, That if any perſon ſhall wilfully, maliciouſly, or contemptuouſly diſturb any congregation aſſembled in any church or permitted meeting-houſe, or ſhall miſuſe any preacher or teacher there, he ſhall be bound over to the ſeſſions of the peace, and forfeit twenty-pounds. No mayor or principal magiſtrate muſt appear at any diſſenting meeting with the enſigns of his office, on pain of diſability to hold that or any other office; no perſon ſhall teach any ſchool, unleſs licenſed by the ordinary, and unleſs he ſubſcribe a declaration of conformity to the church of England, and reverently frequent divine ſervice eſtabliſhed by the laws of this kingdom.

The laws in force againſt the papiſts are many.

Perſons profeſſing the Roman Catholic Religion, beſides the former penalties for not frequenting the pariſh-church, are diſabled from taking any lands either by deſcent or purchaſe, after twenty-one years of age, unleſs they take the oath of allegiance and ſupremacy, as ſpecified in an act of 18 Geo. III. They muſt, at the age of twenty-one, regiſter their eſtates before acquired, and all future conveyances and wills relating to them; they are incapable of preſenting to any church living, or granting to any other perſon any avoidance of the ſame; and they may not keep or teach any ſchool, under pain of perpetual impriſonment, unleſs they firſt take the oath preſcribed in the ſaid 18 Geo. III.

And if they voluntarily hear or ſay maſs, without having firſt taken the oath above-mentioned, they forfeit; the one two hundred, the other one hundred marks, and each ſhall ſuffer one year's impriſonment. If any perſons ſends another abroad to be educated in the popiſh religion, or contributes to his maintenance when there, both the perſons ſending, ſent, and contributing, are liable to certain penalties, as has before been obſerved. Nay, it is high treaſon ſhould theſe errors be aggravated by apoſtaſy or perverſion; that is, where a perſon is reconciled to the ſee of Rome, or procures the reconciliation of others.

Popiſh recuſants, convicted in a court of law, of not attending the ſervice of the church of England, beſides the penalties,

*&c.* above-mentioned, are conſidered as excommunicated; can hold no office or employment; if they keep arms in their houſes, ſuch arms may be ſeized by a juſtice of the peace; they may not come within ten miles of London, under the penalty of one hundred pounds; cannot ſue either in law or equity; may not travel five miles from home, except by licence, on pain of forfeiting all their goods, and may not appear at court, on pain of one hundred pounds. No marriage or burial of ſuch recuſant, or baptiſm of his child, ſhall be performed, but by the clergy of the church of England, under further heavy penalties. A married woman, when recuſant, forfeits two-thirds of her jointure or dower, may not be executrix or adminiſtratrix to her huſband, nor have any ſhare of his goods; and during the coverture, may be impriſoned, unleſs her huſband redeem her at the rate of ten pounds a month, or the third part of all his lands. All other recuſants, within three months after conviction, muſt either ſubmit and renounce their errors, or if required by four juſtices muſt abjure, and renounce the realm, and if they do not depart, or if they return without a licence from the King, they ſhall ſuffer death. Refuſing to make the declaration againſt popery, enjoined by 30 Car. II. ſt. 2. when tendered by a proper magiſtrate, makes the party, if he reſides within ten miles of London, an abſolute recuſant convict, or, if at a greater diſtance, ſuſpends him from having any ſeat in parliament, keeping arms in his houſe, or any horſe above the value of five pounds.

To be a *recuſant*, doth not neceſſarily imply the being of a *papiſt*; but a *recuſant* is any perſon, who refuſes to go to church, and worſhip God after the manner of the church of England: a *popiſh recuſant* is a papiſt who refuſes, and a *popiſh recuſant convict* is a papiſt legally convicted thereof.

Popiſh biſhops or prieſts celebrating maſs, or exerciſing any part of their functions in England, except in the houſes of ambaſſadors, are liable to perpetual impriſonment, unleſs they have before taken and ſubſcribed the above-mentioned oath ſet forth in 18 George III. And further, any popiſh prieſt, born in the dominions of the crown of England, who ſhall come over hither from beyond ſea (unleſs driven by ſtreſs of weather, and tarrying only a reaſonable time) or ſhall be in England three days, without conforming and taking the oaths, is guilty of high treaſon: and all perſons harbouring him are guilty of felony, without benefit of clergy.

To ſecure the religion of this country againſt all ſpecies of nonconformiſts, the *corporation* and *teſt* acts were paſſed. By the

the corporation act, no perſon can be elected to any office relative to the government of any city or corporation, unleſs within a twelvemonth before, he has received the ſacrament of the Lord's ſupper, according to the form of the church of England, and take the oaths of allegiance and ſupremacy. The teſt act enjoins all officers, civil and military, to take the oaths, and make the declaration againſt tranſubſtantiation, in any of the King's Courts at Weſtminſter, or at the quarter-ſeſſions, within ſix calendar months after their admiſſion, and alſo within the ſaid time to receive the ſacrament of the Lord's ſupper, according to the uſage of the church of England, in ſome public church, immediately after divine ſervice and ſermon, and to deliver into court a certificate thereof, ſigned by the miniſter and churchwardens, and alſo to prove the ſame by two credible witneſſes, upon forfeiture of five hundred pounds, and diſability to hold the ſaid office.

5. The following offences are levelled more immediately againſt God; the former were rather attacks upon religion. Of theſe the firſt is Blaſphemy; denying the being and providence of the Almighty, or contumelioufly reproaching our bleſſed Saviour; alſo profane ſcoffing at ſcripture, and expoſing it to contempt and ridicule. Theſe are offences puniſhable at Common Law, by fine and impriſonment, or other infamous, corporal puniſhment.

6. The next offence is common Swearing. Every labourer, ſailor, or ſoldier, profanely curſing or ſwearing, ſhall forfeit one ſhilling, every other perſon under the degree of a gentleman two ſhillings, and every gentleman or perſon of ſuperior rank five ſhillings, to the poor of the pariſh; and on a ſecond conviction, double, and for every ſubſequent offence, treble the ſum firſt forfeited; with all charges of conviction; and in default of payment ſhall be ſent to the houſe of correction for ten days. If in any ſtage-play, interlude, or ſhew, the name of the Holy Trinity, or any of the perſons therein be jeſtingly or profanely uſed, the offender ſhall forfeit ten pounds; one moiety to the King, and the other to the informer.

7. Religious impoſtors are another ſpecies of offenders; ſuch as falſely affect to have a commiſſion from Heaven, and frighten the people by denunciations of judgment: ſuch are puniſhable in the temporal courts with fine, impriſonment, and other infamous, corporal puniſhment.

8 Simony alſo may be ranked among theſe offences. If any patron, for money, or any other corrupt conſideration or promiſe, ſhall preſent, admit, inſtitute, inſtall, or collate any perſon to

an eccleſiaſtical benefice or dignity, both the giver and taker ſhall forfeit two years value of the benefice or dignity; one moiety to the King, and the other to any one who will ſue for the ſame. If perſons alſo corruptly reſign or exchange their benefices, both the giver and the taker ſhall, in like manner, forfeit double the value of the money or corrupt conſideration; and perſons who ſhall corruptly ordain or licenſe any miniſter, or procure him to be ordained or licenſed, ſhall forfeit forty pounds, and the miniſter ten pounds, beſides being rendered incapable of holding any eccleſiaſtical preferment for ſeven years afterwards. Corrupt elections and reſignations in colleges, hoſpitals, and other eleemoſynary corporations, are alſo puniſhable, by penalty of double the value, vacating the office, and forfeiting the right of election for that term to the crown.

9. Profanation of the Sabbath is puniſhable alſo by the ſtatutes. No fair or market ſhall be held on the principal feſtivals, Good-Friday, or any Sunday, except the four Sundays in harveſt, on pain of forfeiting the goods expoſed to ſale. No perſon ſhall aſſemble, out of their own pariſhes, for any ſport whatſoever on a Sunday, nor in their own pariſhes, ſhall uſe any bull or bear-baiting, interludes, plays, or other *unlawful* exerciſes or paſtimes, on pain of forfeiting three ſhillings and fourpence to the poor. No perſon is allowed to work on the Lord's day, or uſe any boat or barge, or expoſe any goods to ſale; except meat in public-houſes, milk and mackarel, at certain hours, and works of neceſſity or charity, on pain of five ſhillings; nor ſhall any drover, carrier, or the like, travel on Sundays, on pain of forfeiting twenty ſhillings.

10. Drunkenneſs, for the firſt offence, is puniſhed with a fine of five ſhillings, or ſitting ſix hours in the ſtocks, and being bound over to good behaviour, in a bond of ten pounds for the ſecond; and there are many acts to prevent tippling.

11. The laſt offence of an immoral kind I ſhall mention is Lewdneſs. Frequenting houſes of ill fame is indictable, and public indecency, groſly ſcandalous, is puniſhable by fine and impriſonment.

Beſides what has been ſaid of Baſtard children, two juſtices, may take order for the puniſhment of the mother and reputed father. The woman may be committed to the houſe of correction, there to be puniſhed and ſet on work for one year; and in caſe of a ſecond offence, till ſhe find ſureties never to offend again. But theſe puniſhments can only be inflicted, if the baſtard becomes chargeable to the pariſh.

II. We

II. We are next to conſider offences againſt the, Law of Nations. Theſe are of three kinds, *viz.* Violation of ſafe-conducts; 2. Infringement of the privileges of ambaſſadors; and, 3. Piracy.

1. Violation of paſſports granted by the King or his ambaſſadors in time of war to the ſubjects of a foreign prince, with whom we are at war; or committing acts of hoſtility againſt thoſe with whom we are not at war, are ſuch breaches of public faith, as every ſtate thinks proper to puniſh. If any of the King's ſubjects attempt or offend, upon the ſea, or any part within the King's obeyſance, againſt any ſtranger in amity, league, or truce, or under ſafe-conduct; and eſpecially by attaching his perſon, or ſpoiling him, or robbing him of his goods; the Lord Chancellor, with any of the judges, may cauſe a full reſtitution and amends to be made to the party injured; and the offender may be puniſhed by indictment,

2. With reſpect to the rights of Ambaſſadors, all proceſs whereby the perſon of any ambaſſador, or of his domeſtic ſervant, may be arreſted, or his goods diſtrained or ſeiſed, ſhall be utterly null and void; and all perſons, proſecuting, ſoliciting, or executing ſuch proceſs, ſhall ſuffer ſuch penalties as the ſaid judges ſhall think fit.

3. Piracy or robbery upon the high ſeas is as much felony as a robbery on the highway. Some other offences are alſo made capital. If any natural born ſubject commits any act of hoſtility upon the high-ſeas, againſt others of his Majeſty's ſubjects, under colour of a commiſſion from any foreign power; this, though in an alien it would be only an act of war, in a ſubject ſhall be conſtrued piracy. And further, any commander or other ſeafaring perſon betraying his truſt, and running away with any ſhip, boat, ordinance, ammunition, or goods; or yielding them up voluntarily to a pirate, or conſpiring to do theſe acts; or any perſon aſſaulting the commander of a veſſel to hinder him from fighting in defence of his ſhip, or confining him, or making or endeavouring to make a revolt on board, ſhall for each of theſe offences ſuffer death; whether he be principal, or merely acceſſory, by ſetting forth ſuch pirates, or abetting them *before* the fact, or receiving or concealing them or their goods *after* it. And principals are expreſsly excluded from the benefit of clergy. Trading with known pirates, or furniſhing them with ſtores, or ammunition, or fitting out any veſſel for that purpoſe, or in any wiſe conſulting, combining, confederating, or correſponding with them, or forcibly boarding any merchant-veſſel, though without ſeizing or carrying her off, and deſtroy-

ing or throwing any of the goods overboard; ſhall be deemed piracy: and ſuch acceſſories to piracy as are deſcribed by the 11 and 12 of W. III. are declared to be principal pirates; and all pirates convicted by virtue of this act are felons without benefit of clergy. To encourage the defence of trading veſſels againſt pirates, the commanders or ſeamen, and the widows of ſuch ſeamen as are ſlain in any piratical engagement, ſhall be entitled to a bounty, to be divided among them, not exceeding one fiftieth part of the value of the cargo on board: and ſuch wounded ſeamen ſhall be entitled to the penſion of Greenwich Hoſpital. And if the commander ſhall behave cowardly, by not defending the ſhip, if ſhe carries guns or arms, or ſhall diſcharge the mariners from fighting, ſo that the ſhip falls into the hands of pirates, ſuch commander ſhall forfeit all his wages, and ſuffer ſix months impriſonment. And any natural-born ſubject or denizen, who in time of war ſhall commit hoſtilities at ſea againſt any of his fellow-ſubjects, or ſhall aſſiſt an enemy on that element, ſhall be conſtrued a pirate.

III. We proceed now to thoſe offences that ſtrike at the King and his government, and theſe are of four kinds; 1. Treaſon; 2. Felonies injurious to the prerogative; 3. *Præmunire*; and, 4. Other miſpriſions and contempts.

1. Firſt then, for Treaſon which here is called *high*-treaſon in contradiction to that *petit* treaſon or treachery, that induces a wife to murder her huſband, a ſervant his maſter, or a clergyman his biſhop.

It is high-treaſon to compaſs or imagine the death of the King, his Queen or their eldeſt ſon and heir. By the King is underſtood, the perſon on the throne, whether a legal king or a uſurper; there being a temporary allegiance due even to a uſurper, for the temporary protection he affords the people. No King, out of poſſeſſion of the throne, however legal his claim to it may be, is entitled to our allegiance; ſo that ſhould a uſurper be on the throne, the ſubject is excuſed and juſtified in obeying and aſſiſting him. Should a King therefore reſign or abdicate the crown, no treaſon can be committed againſt him.

By compaſſing or imagining the death of the King, &c. is underſtood a deſign to deſtroy him, whether ſuch a deſign be carried into execution or not. To provide weapons or ammunition to kill the King, or to conſpire to impriſon him by force, and to aſſemble for the purpoſe, from a preſumption that worſe is intended, are ſufficient overt or open acts of high-treaſon; but mere words ſpoken by an individual, without any treaſonable act or deſign then in agitation, are not held to amount to treaſon.

To have carnal knowledge of the King's wife, eldeſt daughter, or his eldeſt ſon's wife, though with their own conſent, is high-treaſon in both parties. This law is plainly to guard the blood-royal from any ſuſpicion of baſtardy; for it is not treaſon to violate a queen or princeſs dowager.

It is alſo treaſon to levy war againſt the King in his realms: under which words is held taking up arms under a pretence to reform religion or the laws; or to remove evil counſellors, or other grievances, whether real or pretended. Defending a caſtle againſt the King's forces, is alſo a levying of war. So alſo is an inſtruction to pull down *all* incloſures, *all* chapels, *all* brothels, or the like; but a tumult to pull down a particular building is held only to be a riot, it is the univerſality of the deſign that makes it rebellion. A bare conſpiracy to levy war does not amount to treaſon, unleſs it be attended with compaſſing or imagining the King's death.

A man is alſo guilty of high-treaſon, if he be adherent to the King's enemies in his realm, giving to them aid and comfort; ſuch as by giving enemies, at open war, intelligence; ſending them proviſions; ſelling them arms or ammunition; treacherouſly ſurrendering a fortreſs, or the like; but theſe muſt be proved by ſome overt act. Giving aſſiſtance to foreign pirates or robbers invading our coaſt, without any commiſſion from any foreign power, is alſo clearly treaſon; and ſo alſo is the ſame aid or aſſiſtance given to our fellow-ſubjects in rebellion at home, which would be treaſon, if given to our open enemies abroad; it coming under the deſcription of levying war againſt the King. But to relieve a rebel fled out of the kingdom is not treaſon, for criminal ſtatutes are always conſtrued ſtrictly: neither is it treaſon to join either rebels or enemies within the kingdom, if we do it through compulſion or fear; provided we quit them whenever a ſafe opportunity occurs.

Counterfeiting the King's great or privy-ſeal is alſo high-treaſon: ſo is it alſo to counterfeit the King's money, or to bring falſe money into the realm counterfeit to the money of England, knowing the money to be falſe, to merchandize and make payment withal. Alſo if the King's own minters alter the ſtandard or alloy eſtabliſhed by law. But our own gold or ſilver coin are only held to be within this ſtatute; and uttering it, without importing it, is not within the ſtatute. It is, however, made high-treaſon to falſely forge or counterfeit any ſuch kind of coin of gold or ſilver as is not the proper coin of this realm, but ſhall be current within this realm, by conſent of the crown; or to falſely forge or counterfeit the ſign-manual, privy ſignet, or

privy

privy ſeal: and, to bring into this realm ſuch falſe or counterfeit foreign money, being current here, knowing the ſame to be falſe, with intent to utter the ſame for payment: but this money muſt be ſuch as is made current here by proclamation. Portugal money was never current by proclamation, of courſe, counterfeiting Portugal money does not amount to high-treaſon, but is a crime of an inferior degree. Clipping, waſhing, rounding, or filing, for gain's ſake, any of the money of this realm, or other money ſuffered to be current here, is high-treaſon; ſo is impairing, diminiſhing, falſifying, ſcaling, and lightening it. Whoever, without proper authority, ſhall knowingly make or mend, or aſſiſt in ſo doing, or ſhall buy, ſell, conceal, hide, or knowingly have in his poſſeſſion any implements of coinage, or other tools or inſtruments proper only for the coinage of money, or ſhall convey the ſame out of the King's mint; he, together with his counſellors, procurers, aiders, and abettors, ſhall be guilty of high-treaſon. It is alſo an equal crime to mark any coin on the edges with letters or otherwiſe, in imitation of thoſe uſed in the mint; or to colour, gild, or caſe over any coin reſembling the current coin, or even round blanks of baſe metal. If any perſon colours or alters any ſhilling or ſix-pence, either lawful or counterfeit, to make them reſpectively reſemble a guinea or half-guinea, or any half-penny or farthing, to make them reſpectively reſemble a ſhilling or ſix-pence, he ſhall be adjudged guilty of high-treaſon; but the offender ſhall be pardoned, if (out of priſon) he diſcovers and convicts two other offenders of the ſame kind.

It is high-treaſon alſo if a man ſlay the chancellor, treaſurer, or the King's juſtices of the one bench or the other, juſtices in Eyre, or juſtices of aſſize, and all other juſtices aſſigned to hear and determine, being in their places, doing their offices. Mere wounding or attempting to kill is not included under theſe caſes; nor do they extend to the barons of the Exchequer, as ſuch; but the lord-keeper or commiſſioners of the great ſeal ſeem to be within them.

To defend the pope's juriſdiction in this realm is, for the firſt offence, a heavy miſdemeſnor, and for the ſecond high-treaſon. If any popiſh prieſt, born in the dominions of the crown of England, ſhall come hither from beyond the ſeas, unleſs driven by ſtreſs of weather, and departing in a reaſonable time: or ſhall tarry here three days without conforming to the church, he is guilty of high-treaſon. And if any natural-born ſubject be withdrawn from his allegiance and reconciled to the pope or ſee of Rome, or any other prince or ſtate, both he and all

all ſuch as procure ſuch reconciliation ſhall incur the guilt of high-treaſon. Every popiſh prieſt, of courſe, renounces his allegiance to his temporal prince, the moment he takes orders, and is held to be reconciled to the pope: an obſtinate defence alſo of the pope's authority here, or a formal reconciliation to the ſee of Rome, is conſtrued to be a withdrawing from one's natural allegiance.

If any perſon ſhall endeavour to deprive or hinder any perſon, being the next in ſucceſſion to the crown, according to the limitation of the act of ſettlement, from ſucceeding to the crown, and ſhall maliciouſly and directly attempt the ſame by any overt act, ſuch offence ſhall be high-treaſon. And if any perſon ſhall maliciouſly, adviſedly, and directly, by writing or printing, maintain and affirm that any other perſon hath any right or title to the crown of this realm, otherwiſe than according to the act of ſettlement; or that the King of this realm, with the authority of parliament, are not able to make laws and ſtatutes to bind the crown, and the deſcent thereof, ſuch perſon ſhall be guilty of high-treaſon.

So much for the crime: the puniſhment is dreadful. The offender is to be drawn, that is, dragged to the gallows. He is to be hanged by the neck, and then cut down alive: his entrails are to be taken out and burned while he is yet alive; his head to be cut off; his body to be divided into four parts, and his head and quarters to be at the King's diſpoſal.

The King may and frequently has diſcharged, where any nobleman is attainted, all the puniſhment, except that of beheading. In the caſe of coining, the puniſhment in men is milder, being that only of being drawn and hanged till dead; and as decency forbids expoſing and mangling the bodies of women, their puniſhment is to be drawn to the gallows, and there hanged.

Attainder, forfeiture, and corruption of blood, are the conſequences of this judgment: but this we ſhall ſpeak of hereafter.

2. The next offences to be treated of, under thoſe againſt the King and government, are felonies injurious to the royal prerogative.

Felony implies forfeiture, or an act done at the price of one's eſtate, to which ſome capital or other puniſhment is annexed, according to the degree of guilt; but I ſhall conſider it as implying a capital offence.

Of ſuch felonies as are injurious to the King's prerogative, there

there are ſix; *viz.* Offences relating to coin, not amounting to treaſon; Felonies againſt the King's council; Serving foreign powers; Embezzling or deſtroying the King's armour or warlike ſtores; and, Deſertion from the army, in time of war.

With reſpect to the coin, there are ſome miſdemeſnors not amounting even to felony. None ſhall bring any foreign coins of baſe metal, into the realm, on pain of forfeiture of life and goods. No ſterling money ſhall be melted down, on pain of forfeiture thereof. None ſhall bring falſe or ill money into the realm, on pain of forfeiture of life and member by the perſons importing, and the ſearchers permitting ſuch importation. To make, coin, buy, and bring into the realm any gally half-pence, ſuſkins, or dotkins, in order to utter them, is felony; and knowingly to receive or pay either them or blanks, is forfeiture of a hundred ſhillings. Forgers of foreign coin, though not made current here by proclamation, ſhall (with their aiders and abettors) be guilty of miſpriſion of treaſon, a crime that will be explained by-and-by. Melting down any current ſilver money, ſhall be puniſhed with forfeiture of the ſame, and alſo double the value, and the offender, if a freeman of any town, ſhall be diſfranchiſed: if not, ſhall ſuffer ſix months impriſonment. If any perſon buys or ſells, or knowingly has in his cuſtody any chippings, or filings of the coin, he ſhall forfeit the ſame, and five hundred pounds, one moiety to the King, and the other to the informer; and be branded in the cheek with the letter R. If any perſon ſhall blanch or whiten copper for ſale (making it reſemble ſilver) or buy, or ſell, or offer to ſale any malleable compoſition, which ſhall be heavier than ſilver, and look, touch, and wear like gold, but be beneath the ſtandard; or if any perſon ſhall receive or pay any counterfeit or diminiſhed, milled money of this kingdom, not being cut in pieces (an operation which all perſons are empowered by ſtatute to do, when tendered to them) at a leſs rate than it ſhall import to be of; all ſuch perſons ſhall be guilty of felony. If any perſon ſhall utter or tender in payment any counterfeit coin, knowing it ſo to be, he ſhall, for the firſt offence, be impriſoned ſix months, and find ſureties for his good behaviour for ſix months more; for the ſecond offence, ſhall be impriſoned two years, and find ſureties for two years more; and for the third offence, ſhall be guilty of felony, without benefit of clergy. (It behoves every one to attend to this law, as many are guilty of putting off a bad piece of money, ſaying, it ſhall, go as they received it). Alſo if a perſon knowingly tenders in payment any counterfeit money

money, and at the ſame time has more in his cuſtody, or ſhall, within ten days after, knowingly tender other falſe money, he ſhall be deemed a common utterer of counterfeit money, and ſhall, for the firſt offence, be impriſoned one year, and find ſureties for his good behaviour for two years longer; and for the ſecond, be guilty of felony without benefit of clergy. Perſons counterfeiting copper half-pence or farthings, with their abettors, or buying, ſelling, receiving, or putting off any counterfeit copper money (not being cut in pieces or melted down) at a leſs value than it imports, ſhall be guilty of ſingle felony. And by a temporary ſtatute, if any quantity of money, exceeding the ſum of five pounds, being or purporting to be the ſilver coin of this realm, but below the ſtandard of the mint in weight and fineneſs, ſhall be imported into Great Britain or Ireland, the ſame ſhall be forfeited in equal moieties to the crown and proſecutor.

Felonies againſt the King's council are, where any ſworn ſervant of the King's houſhould conſpires or confederates to kill any lord of this realm, or other perſon ſworn of the King's council. And aſſaulting the King, wounding, or attempting to kill any privy-counſellor in the execution of his office, is felony without benefit of clergy.

It is felony for any perſon whatever to go out of the realm to ſerve any foreign prince, without having firſt taken the oath of allegiance before his departure. It is felony alſo for any gentleman or perſon of higher degree, or who hath borne any office in the army, to go out of the realm to ſerve ſuch foreign prince or ſtate, without previouſly entering into a bond, with two ſureties, not to be reconciled to the ſee of Rome, or enter into any conſpiracy againſt his natural ſovereign. If any ſubject of Great-Britain ſhall enliſt himſelf, or if any perſon ſhall procure him to be enliſted in any foreign ſervice, or detain or embark him for that purpoſe, without licence under the King's ſign-manual, he ſhall be guilty of felony, without benefit of clergy; but if the perſon ſo enliſted or enticed, ſhall diſcover his ſeducer within fifteen days, ſo as he may be apprehended and convicted of the ſame, he ſhall be indemnified. And to ſerve under the French King as a Military officer, and to enter into the Scotch Brigade in the Dutch ſervice, without previouſly taking the oaths of allegiance and abjuration, ſhall be a forfeiture of five hundred pounds.

Embezzling or deſtroying the King's armour or military ſtores, is alſo felony; and if any perſon, having the charge or cuſtody of the King's armour, ordnance, ammunition, or habiliments

of

of war, or of any victual provided for victualling the King's ſoldiers or marriners; ſhall either for gain, or to impede his majeſty's ſervice, embezzle the ſame to the value of twenty ſhillings, ſuch offence ſhall be felony without benefit of clergy; and equally ſo for naval ſtores.

Deſertion, in time of war, from either land or ſea-ſervice, either in England or abroad, is felony without benefit of clergy.

3. Another ſpecies of offence againſt the King and his government, is *præmunire*. To put an end to the pope's appointing to biſhopricks, it is enacted, That if the dean and chapter refuſe to elect the perſon named by the King, or if any archbiſhop or biſhop refuſe to confirm or conſecrate him, they ſhall incur the penalties of the ſtatutes of *præmunire*, which were formed in the reign of Richard II. What theſe penalties are will be ſhewn below. To refuſe the oath of ſupremacy will incur the ſame penalties: and, to defend the pope's juriſdiction in this realm is a *præmunire* for the firſt offence, and high-treaſon for the ſecond. To import any *agnus Dei*, croſſes, beads, or other ſuperſtitious things, pretended to be hallowed by the biſhop of Rome, and tender the ſame to be uſed; or to receive the ſame with ſuch intent, and not diſcover the offender: or, if a juſtice of the peace, knowing thereof, ſhall not, within fourteen days, declare it to a privy-counſellor, they all incur a *præmunire*: but, importing or ſelling maſs books, or other popiſh books, is only a penalty of forty ſhillings. To contribute to the ſupport of a jeſuits college, or any popiſh ſeminary beyond ſea, or to the maintenance of any jeſuit or popiſh prieſt in England, is liable alſo to the pains of *præmunire*.

Acting as a broker or agent, in any uſurious contract, where above ten *per cent.* intereſt is taken, incurs the penalties of *præmunire*. So does it to obtain any ſtay of proceedings, other than any arreſt of judgment, or writ of error, in any ſuit for a monopoly; alſo, to obtain an excluſive patent for the ſole making or importation of gunpowder or arms, or to hinder others from importing them; alſo, to aſſert maliciouſly and adviſedly, by ſpeaking or writing, that both or either Houſe of Parliament have a legiſlative authority without the King. To ſend any ſubject of this realm a priſoner into parts beyond the ſeas is a *præmunire*, incapable of pardon. Perſons of eighteen years of age, refuſing to take the new oaths of allegiance as well as ſupremacy, on tender by the proper magiſtrate, are liable to the pains of *præmunire*; and, ſerjeants, counſellors, proctors, attorneys, and all officers of courts, practiſing without

out having taken the oaths of allegiance and ſupremacy, and ſubſcribed the declaration againſt popery, are guilty of a *præmunire*, whether the oaths be tendered or not. It is a *præmunire* to aſſert maliciouſly, and directly, by preaching, teaching, or adviſedly ſpeaking, that any perſon, other than according to the acts of ſettlement and union, hath any right to the throne of theſe kingdoms, or that the King and Parliament cannot make laws to limit the deſent of the crown. If the aſſembly of peers of Scotland, convened to elect their ſixteen repreſentatives, ſhall preſume to treat of any other matter, ſave only the election, they incur the penalties of a *præmunire*: ſo do all ſuch as knowingly and wilfully ſolemnize, aſſiſt, or are preſent at, any forbidden marriage, of ſuch of the deſendants of the body of King Geo. II. as are, by that act, prohibited to contract matrimony without the conſent of the crown.

The puniſhments of *præmunire* are as follow: "That, from "the conviction, the offender ſhall be out of the King's pro- "tection, and his lands and tenements, goods and chattels, for- "feited to the King, and that his body ſhall remain in priſon at "the King's pleaſure, or (according to ſome,) during life." An offender convicted of *præmunire*, can bring no action for any private injury, let it be ever ſo attrocious: and no man, knowing him to be guilty, can with ſafety, give him aid or relief.

4. A fourth ſpecies of offences againſt the King and his government, are called Miſpriſions and contempts.

Miſpriſions are of two kinds, *negative* and *poſitive*. Negatine miſpriſions are the concealing what the law enjoins to be revealed; poſitive, the committing what the law abſolutely prohibits.

Miſpriſion of treaſon, is one of the negative kind, and conſiſts in the mere knowing and concealing of treaſon, though no aſſent be given thereto: for aſſent makes the aſſentor a principal. Every man appriſed of treaſon, is bound to reveal it, as ſoon as convenient, to ſome juſtice of the peace. This will acquit him of miſpriſion. But, if their be any probable circumſtances of aſſent: that is to ſay, if a man goes to a treaſonable meeting, knowingly, and being at ſuch a meeting once by accident, and hearing a treaſonable conſpiracy, meets a ſecond time, and hears more, and conceals it; the law deems this an aſſent, and the concealer is guilty of high-treaſon.

Forgers of foreign coin, not current in this kingdom, their aiders, abettors, and procurers, are all guilty of miſpriſion of treaſon;

treaſon; the puniſhment of which is, loſs of the profits of lands during life, forfeiture of goods, and impriſonment for life.

Miſpriſion of felony is, as in treaſon, the concealing a known felony, to which a man might never aſſent: the puniſhment for which is, in a public officer, impriſonment for a year and a day; in a common perſon, impriſonment for a leſs time, at the diſcretion of the judge; and in both, fine and ranſom at the King's pleaſure: by which King's pleaſure, here, and in all caſes, is underſtood, at the pleaſure of the judges in the King's courts of juſtice.

Concealing a treaſure-trove, which belongs to the King or his grantees, is alſo a negative miſpriſion, and puniſhable with fine and impriſonment.

Poſitive miſpriſions are called contempts or high miſdemeſnors; of theſe, the mal-adminiſtration of ſtate-officers is one, and uſually puniſhed by baniſhment, impriſonment, fines, or perpetual incapacity to ſerve again, and this through the mode of parliamentary impeachment. The offence of embezzling the public money is alſo of this kind, and ſubjects the offender to a diſcretionary fine and impriſonment.

Refuſing to aſſiſt the King by advice in council, if called upon, or by perſonal ſervice in war, againſt a rebellion or invaſion; omitting to join the *poſſe comitatus*, at the requeſt of the ſheriff or juſtices, which all perſons, at fifteen years of age, under the degree of nobility, and able to travel, are bound to do; are contempts againſt the King's prerogatives; ſo is taking a penſion from any foreign prince, without the King's conſent; diſobeying the King's lawful commands, whether iſſued by writs from the courts of juſtice, by ſummons, to attend his privy-council, or by letters, commanding the return of any one abroad, (in diſobedience to which, his lands ſhall be ſeiſed till he does return, and himſelf puniſhed afterwards,) or by his proclamation, or writ of *ne exeat regnum*, commanding him to ſtay at home: ſo alſo is diſobedience to any act of parliament, where no penalty is inflicted: and in all theſe caſes the contempt is puniſhable by fine and impriſonment, at the diſcretion of the judge.

Writing, or ſpeaking againſt the King, curſing, or wiſhing him ill, defaming him, or doing any thing that may either leſſen him in the opinion of his ſubjects, or weaken his government, is a contempt and miſpriſion againſt the King's perſon and government. To drink to the pious memory of a traitor,

or,

or, for a clergyman to abſolve traitors at the gallows, who perſiſt in the treaſons for which they ſuffer, have been held as offences of this ſpecies, for which the offender may not only be fined and impriſoned, but ſuffer the pillory, or other infamous corporal puniſhment.

Denying the King's right to the crown, by adviſedly ſpeaking, is a *præmunire*; but, in common and unadviſed diſcourſe, it is only a contempt againſt the King's title, and puniſhable by fine and impriſonment. If any perſon ſhall, in any-wiſe, hold, affirm, or maintain, that the common law of this realm, not altered by parliament, ought not to direct only the right of the crown of England, it is a miſdemeſnor, and puniſhable with forfeiture of goods and chattels. Refuſing or neglecting to receive the ſacrament, and take the oaths appointed by ſtatute, for the better ſecuring the government, and yet acting in a public office, place of truſt, or other capacity, for which the ſaid oaths are required to be taken, within ſix calendar months after admiſſion, is alſo a contempt; the penalties for which are, incapacity to hold the ſaid office, or any other; to proſecute any ſuit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament: and after conviction, the offender ſhall alſo forfeit five hundred pounds to him or them that will ſue for the ſame. But any perſon forfeiting his office, may take a new grant thereof, on his taking the oaths, and conforming, providing it be not filled up before. Perſons, however, beyond the ſeas, ſhall not be diſabled, if they qualify within ſix months after their return. Members on the foundation of any college in the two univerſities, who are bound to take the oaths, muſt alſo regiſter a certificate thereof in the college-regiſter, within one month after; otherwiſe, if the electors do not remove him, and elect another, within twelve months or after, the King may nominate a perſon to ſucceed him, by his great ſeal, or ſign-manual. Beſides thus taking the oaths for offices, any two juſtices of the peace, may ſummon and tender the oaths to any perſon whom they ſhall ſuſpect to be diſaffected; and every perſon refuſing the ſame, becomes a non-juror, and ſhall be adjudged a popiſh recuſant convict, and ſubject to the ſame penalties with ſuch recuſant, which, in the end, may amount to the alternative of abjuring the realm, or ſuffering death as a felon.

Malicious ſtriking in the King's palace, wherein his royal perſon reſides, whereby blood is drawn, is a contempt againſt the palace, and puniſhable by perpetual impriſonment and fine,

at

at the King's pleaſure, and alſo with loſs of the offender's right hand.

Striking in the King's upper courts of juſtice in Weſtminſter-Hall, or at the aſſizes, is a contempt againſt ſuch courts, and whether blood be drawn or not, is puniſhable with the loſs of the right hand, impriſonment for life, and forfeiture of goods and chattels, and of the profits of lands during life; even aſſaulting a judge ſitting in the court, by drawing a weapon, is puniſhable in the ſame way. The reſcue alſo of a priſoner from any of the ſaid courts, without ſtriking a blow, is puniſhed with perpetual impriſonment, and forfeiture of goods, and of the profits of land during life. And an affray or riot, near the ſaid courts, but out of their actual view, is puniſhable with fine and impriſonment. Nay, even threatning or reproachful words only to any judge, ſitting in the courts, is a high miſpriſion, and puniſhable with large fines, impriſonment, and corporal puniſhment. In the inferior or lower courts, an affray, or contemptuous behaviour, is puniſhable with a fine by the judge there ſitting; even by the ſteward in a court-leet, or the like. Such as are guilty of injurious treatment to any, under the immediate protection of a court of juſtice, are alſo puniſhable with fine and impriſonment, as if a man aſſaults or threatens his adverſary for ſuing him: a counſellor or attorney for being employed againſt him; a juryman for his verdict; or a goaler, *&c.* for keeping him in cuſtody, and doing his duty; nay, even to diſſwade a witneſs from giving evidence; diſcloſing an examination before the privy council; or adviſing a priſoner not to plead: all which are impediments of juſtice, and, of courſe, contempts of the King's courts, and puniſhable with fine and impriſonment. The ſame puniſhment attends any of the grand jury, who ſhall diſcloſe, to the perſon indicted, the evidence that appeared againſt him.

IV. The next offences we propoſed to conſider in our order of diſtribution, are ſuch as infringe the Rights of the Public. This ſpecies includes ſuch a number of inferior and ſubordinate claſſes, as, were we to enter critically into the whole, would be tedious to the laſt degree; we will confine ourſelves therefore to general deſcriptions. Theſe then may be divided into five, *viz.* 1. Offences againſt public juſtice; 2. Thoſe againſt public peace; 3. Thoſe againſt trade; 4. Thoſe againſt public health; and, 5. Thoſe againſt the police.

1. Of thoſe offences againſt Public Juſtice, are the following, embezzling or vacating records; abuſes of gaolers; obſtructing proceſs; eſcapes from confinement; breaking priſon; reſcue; returning from tranſportation; taking rewards for ſtolen goods; receiving

receiving ſuch goods: compounding felony; barretry; maintenance; champetry; compounding informations; conſpiracy; perjury; bribery; embracery; falſe verdicts; negligence of duty; oppreſſion; and extortion.

*Embezzling* or *vacating records*, or falſifying certain other proceedings in a court of judicature. If any clerk or other perſon ſhall wilfully take away, withdraw, or avoid any record or proceſs in the ſuperior courts of juſtice in Weſtminſter-Hall, by reaſon whereof the judgment ſhall be reverſed, or not take effect, it is felony not only in the principal actors, but alſo in their procurers and abettors. To acknowledge any fine, recovery, deed enrolled, ſtatute, recognizance, bail, or judgment, in the name of another perſon not privy to the ſame, is felony without benefit of clergy. This law extends only to the courts themſelves; but, to perſonate any other perſon, (as bail) before any judge of aſſize, or other commiſſioner authorized to take bail in the country, is alſo felony.

To prevent *abuſes in gaolers*, if any gaoler, by too great dureſs of impriſonment, makes any priſoner, that he hath in ward, accuſe and turn evidence againſt ſome other perſon, he is guilty of felony.

In *obſtructing* the execution of arreſts in criminal *proceſs*, it hath been held, that the party oppoſing ſuch arreſts, becomes a partaker of the crime, that is, an acceſſory in felony and a principal in high-treaſon. And perſons oppoſing the execution of any proceſs, in pretended privileged places, within the bills of mortality in London; ſuch as White-Friars, the Savoy and the Mint; or, abuſing any officer in his endeavours to execute his duty therein, ſo that he receives bodily hurt, ſhall be guilty of felony, and tranſported for ſeven years; and perſons in diſguiſe, joining in or abetting any riot or tumult on ſuch account, or oppoſing any proceſs, or aſſaulting and abuſing any officer executing, or for having executed the ſame, ſhall be felons without benefit of clergy.

A criminal's *eſcaping* when arreſted, is puniſhable by fine and impriſonment; ſo is the officer, ſhould he ſuffer ſuch eſcape, either by negligence or connivance; the criminal is puniſhable by fine, and the officer is liable to be puniſhed in the ſame degree as the criminal would, if convicted, whether it be for treaſon, felony, or treſpaſs, and this whether the priſoner was actually committed to gaol, or only under an arreſt. But though the felony for which the priſoner was committed be not within clergy, the officer ſhall have the benefit of clergy. The officer, however, cannot thus be puniſhed, unleſs the criminal ſo

eſcaping

eſcaping had received judgment, or been attainted upon verdict, confeſſion, or outlawry of the crime for which he was in cuſtody. Though before the conviction of the priſoner, the officer for ſuch neglect may be puniſhed by fine and impriſonment.

*Breaking out of priſon*, when committed for a capital offence, is felony in the offender; and if in confinement, either in goal or the ſtocks, for any leſſer charge, it is puniſhable with fine and impriſonment.

*Reſcuing* a priſoner from an arreſt or impriſonment, makes a man equal in guilt with the perſon ſo arreſted or impriſoned, and he is liable to be arraigned and puniſhed for the ſame, in an equal degree, if the perſon reſcued had received judgment or been attainted. If five or more perſons aſſemble to reſcue any retailers of ſpirituous liquors, or to aſſault the informers againſt them, they are guilty of felony, and ſhall be tranſported for ſeven years. Conveying to any priſoner in cuſtody for treaſon or felony, any arms, inſtruments of eſcape, or diſguiſe, without the knowledge of the goaler, though no eſcape be attempted, or any way to aſſiſt ſuch priſoner to attempt an eſcape, though no eſcape be actually made, is felony and puniſhable with tranſportation for ſeven years: or, if the priſoner be in cuſtody for petit-larceny, or other inferior offence, or charged with a debt of one hundred pounds, it is a miſdemeſnor, and puniſhable with fine and impriſonment. And, by the ſeveral acts of tranſportation, deſtroying turnpikes, *&c.* ſmuggling, murder, and the black-act, to reſcue or attempt to reſcue any perſon committed for the offences, in thoſe acts is felony, without benefit of clergy; and to reſcue, or attempt to reſcue, the body of a felon executed for murder, is ſingle felony, and puniſhable with tranſportation for ſeven years. Nay, if any perſon be charged with any of the offences in the black-act, and being required by order of the privy-council to ſurrender, neglects ſo to do for forty days, both the offender and all that knowingly conceal, aid, abet, or ſuccour him, are deemed guilty of felony, without benefit of clergy.

*Returning from tranſportation* before the expiration of the term for which the offender was ordered to be tranſported, or had agreed to tranſport himſelf, is, by ſeveral ſtatutes, made felony alſo without benefit of clergy; as is alſo the aſſiſting ſuch a perſon to eſcape from the perſons conveying them to the port of tranſportation.

*Taking rewards* under a pretence of helping the owner to his *goods ſtolen*, is equally criminal with the ſtealing; and the offender ſhall ſuffer as the felon who ſtole them, unleſs he cauſes

ſuch

ſuch principal felon to be apprehended and tried, and gives evidence againſt him.

*Receivers of Stolen Goods*, knowing them to be ſtolen, are deemed acceſſory to the theft and felony, and are puniſhable accordingly, *with* the principal, or *after* the principal is convicted; and ſuch receivers may be proſecuted for a miſdemeſnor, and puniſhed by fine and impriſonment, though the principal felon be not *before* taken, ſo as to be proſecuted and convicted. In the caſe of ſtolen lead, iron, and other metals, ſuch offence is puniſhable by tranſportation for fourteen years; perſons alſo having lead, iron, and other metals in their cuſtody, and not giving a ſatisfactory account how they came by the ſame, are guilty of a miſdemeſnor, and puniſhable by fine and impriſonment. And all knowing receivers of ſtolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the ſtealing, may be tried as well *before* as *after* the conviction of the principal, and whether he be in or out of cuſtody; and if convicted, ſhall be adjudged guilty of felony, and be tranſported for fourteen years.

Theft-bote, or *compounding of felony*, (that is, where the perſon robbed, not only knows the robber, but alſo takes his property again, or receives other amends, on agreement not to proſecute,) is puniſhable as a miſdemeſnor with fine and impriſonment. Nay, advertiſing a reward for the return of things ſtolen, with "No queſtions aſked," or words to that effect ſubjects the advertizer and printer, each, to a penalty of fifty pounds.

Frequently exciting and occaſioning ſuits and quarrels, either at law or otherwiſe, called common *barretry*, is an offence puniſhable with fine and impriſonment. But no one can be a barrator in reſpect of one act only. If any one, who hath been convicted of forgery, perjury, ſubornation, or common barretry, ſhall practice as an attorney, ſolicitor, or agent in any ſuit; the court, upon complaint, ſhall examine it in a ſummary way; and if proved, ſhall direct the offender to be tranſported for ſeven years. Suing another in the name of a fictitious plaintiff, if in any of the King's ſuperior courts, is a high contempt and puniſhable at their diſcretion; in the lower courts, it is puniſhable by ſix months impriſonment, and treble damages to the party injured.

Officious intermeddling in a ſuit that we have no concern in, by maintaining or aſſiſting either party with money to carry it on, called *maintenance*, is an offence alſo againſt public juſtice, and puniſhable by fine and impriſonment, and with a forfeiture

of ten pounds. But a man may ſupport the ſuit of his near relation, his ſervant, or his poor neighbour, from charity and compaſſion, with impunity.

*Champerty* is a ſpecies of maintenance, and puniſhable in the ſame manner; being the agreement of any one with a plaintiff or defendant, to pay the expences of a ſuit, on condition of dividing the property ſued for between them, in caſe they prevail; which is a kind of purchaſing a ſuit or a right of ſuing. To prevent this, no man at common law can aſſign any right in a thing, unleſs he has that thing abſolutely in poſſeſſion; and by ſtatute, no one ſhall ſell or purchaſe any pretended right or title to any land, unleſs the vender hath received the profits thereof, for one whole year before ſuch grantor hath been in actual poſſeſſion of the land, or of the reverſion or remainder; on pain that both purchaſer and vender ſhall forfeit the value of ſuch land to the King and proſecutor. Theſe offences relate to civil ſuits only. But,

*Compounding of informations* upon penal ſtatutes is a ſimilar offence in criminal cauſes: to prevent which, it is enacted, That if any perſon informing, under pretence of any penal law, makes any compoſition without leave of the court, or takes any money or promiſe from the defendant to excuſe him, he ſhall forfeit ten pounds, ſhall ſtand two hours on the pillory, and ſhall be forever diſabled to ſue in any popular or penal ſtatute.

A *conſpiracy* to indict an innocent perſon of felony is a farther abuſe of juſtice. If ſuch innocent perſon be thus malicioufly indicted and acquitted, he may either have a civil action againſt the conſpirators, or he may indict them at the ſuit of the King, and puniſh them by impriſonment, fine, and pillory. Sending letters, threatening to accuſe any one of a crime puniſhable with death, tranſportation, pillory, or other infamous puniſhment, in order to extort money, or other valuable chattels, is puniſhable, at the diſcretion of the court, with fine, impriſonment, pillory, whipping, or tranſportation for ſeven years.

Wilful and corrupt *perjury* is another offence under this head; but the law takes notice of no perjury, but ſuch as is committed in ſome court of juſtice, or before ſome magiſtrate or officer properly authorized to adminiſter an oath, in ſome civil or criminal proceedings. The perjury muſt alſo be corrupt, wilful, and poſitive, not committed on ſurprize or the like; it muſt alſo be in ſome point material to the matter in queſtion; no regard being paid either to voluntary oaths, or perjury, in any trifling, collateral circumſtance. Subornation of perjury is, procuring another to take ſuch a falſe oath, as would be conſidered perjury

perjury in the taker. The puniſhment for perjury, or ſubornation of perjury, at common law, is fine and impriſonment. But there is a ſtatute that inflicts perpetual infamy, and a penalty of forty pounds on the ſuborner; and, in default of payment, impriſonment for ſix months, and to ſtand with both ears nailed to the pillory. Perjury, by the ſame ſtatute, is puniſhable with ſix months impriſonment, perpetual infamy, and a fine of twenty pounds, or to have both ears nailed to the pillory. But, as a ſtatute of Geo. II. gives the court a power either to ſend the offender to the houſe of correction, for a term not exceeding ſeven years, or tranſport him for the ſame period, and makes it felony, without benefit of clergy, to eſcape, or return before the expiration of the time. Proſecutions for this offence are uſually carried on at common law. Indeed, if a defendant perjureth himſelf in Chancery, the Exchequer-chamber, or the like, he is not puniſhable by indictment at the common law. But, to convict a man of perjury, a probable evidence is not enough, but it muſt be a ſtrong, clear evidence, and the witneſſes muſt be more numerous than thoſe on the ſide of the defendant, for otherwiſe it is only oath againſt oath; and the party prejudiced by the perjury ſhall not be admitted to prove the perjury. Quakers making ſolemn affirmation wilfully and corruptly, ſhall ſuffer as in caſes of perjury.

*Bribery* is another ſpecies of offence againſt public juſtice; that is, when a judge or other perſon concerned in the adminiſtration of juſtice, takes an undue reward to influence his conduct in his office. In inferior offices this offence is puniſhed with fine and impriſonment, and in the offer of a bribe, whether taken or not, the ſame. But all judges and officers of the King, convicted of bribery, ſhall forfeit treble the bribe, be puniſhed at the King's will, even to death, and be diſcharged from the King's ſervice for ever.

Attempting to influence a jury corruptly to any one ſide, by any means whatever, is called *embracery*, and is puniſhable by fine and impriſonment; and in the jurors ſo influenced by perpetual infamy, impriſonment for a year, and forfeiture of tenfold value.

*Falſe verdicts* of jurors, whether occaſioned by embracery or not, was formerly puniſhed by attaint.

*Negligence of duty* in ſheriffs, coroners, conſtables, and other public officers, entruſted with the adminiſtration of juſtice, is puniſhable by fine, and, in very notorious caſes, with the loſs of their office, provided it be a lucrative one. Omitting to ap-

prehend perſons offering ſtolen lead, iron, and other metals to ſale, is puniſhable by impriſonment and a fine.

All *oppreſſions* and tyrannical partiality of judges and other magiſtrates, in the adminiſtration, or under colour, of their office, if proſecuted either by impeachment in parliament, or by information in the court of King's Bench, according to the rank of the offenders, is ever ſeverely puniſhed by fines, impriſonment, forfeiture of office, or other diſcretionary cenſure.

*Extortion* is the laſt offence I ſhall mention under the abuſes of public juſtice. This is an officer's unlawfully demanding, by virtue of his office, any money or valuable conſideration, that he has no right to demand, or before it be due; and is puniſhable by fine and impriſonment, and ſometimes with a forfeiture of the office.

2. The next claſs of offences among thoſe that infringe the rights of the public, are ſuch as are levelled at the public peace, and called Breaches of the peace. Theſe are riotous aſſembling, unlawful hunting, ſending threatening letters, deſtroying floodgates, affrays, unlawful aſſemblies, tumultuous petitioning, forcible entry or detainer, going armed, ſpreading falſe tales or prophecies, challenging to fight, and libels.

The *rictous aſſembling* of twelve perſons and more, and not diſperſing, upon proclamation, is of this kind. If any twelve perſons are unlawfully aſſembled, to the diſturbance of the peace, and any one juſtice of the peace, ſheriff, under ſheriff, or mayor of a town, ſhall think proper to command them, by proclamation, to diſperſe; if they contemn his orders, and continue together for one hour afterwards, ſuch contempt ſhall be felony without benefit of clergy. And, if the reading of the proclamation be by force oppoſed, or the reader be in any manner wilfully hindered from the reading of it, ſuch oppoſers and hinderers are felons, without benefit of clergy; and all perſons to whom ſuch proclamation ought to have been made, and knowing of ſuch hindrance, and not diſperſing, are felons, without benefit of clergy. And all perſons are indemnified who ſhall chance to kill any of the mob in endeavouring to diſperſe them. And if any perſons ſo riotouſly aſſembled, begin, even before proclamation, to pull down any church, chapel, meeting-houſe, dwelling-houſe, or out-houſes, they ſhall be felons without benefit of clergy.

To appear armed in any encloſed foreſt or place where deer are uſually kept, or in any warren for hares or conies, or in any high road, open heath, common, or down, by day or night, with faces blacked, or otherwiſe *diſguiſed*, or (being ſo diſguiſed)

guiſed) to hunt, wound, kill, or ſteal any deer, to rob a warren, or to ſteal fiſh, or to procure, by gift or promiſe of reward, any perſon to join them in ſuch unlawful act, is felony without benefit of clergy.

Knowingly to ſend any letter without a name, or with a fictitious name, demanding money, veniſon, or any other valuable thing, or *threatening*, without any demand, to kill any of the King's ſubjects, or to fire their houſes, out-houſes, barns, or ricks, is alſo felony without benefit of clergy.

To pull down or deſtroy any *lock*, *ſluice*, or *flood-gate* erected, by act of parliament, on a navigable river, or to reſcue any perſon in cuſtody for the ſame, is felony without benefit of clergy. And maliciouſly damaging or deſtroying any banks, ſluices, or other works on ſuch navigable river, opening the flood-gates, or otherwiſe obſtructing the navigation, is felony, puniſhable with tranſportation for ſeven years. Maliciouſly pulling down or otherwiſe deſtroying any *turnpike*-gate or fence, toll-houſe, or weighing engine thereunto belonging, erected by authority of parliament, or to reſcue any perſon in cuſtody for the ſame, is felony, without benefit of clergy.

*Affrays*, as the public fighting of two or more perſons, is puniſhable by fine and impriſonment, according to the circumſtances of the caſe. Duelling, diſturbing the officers of juſtice in the execution of their office, fighting in the King's courts, in churches or church-yards, are great aggravations of the offence. Any private perſon preſent is juſtifiable in parting the combatants, let the conſequence be what it may. A conſtable, or other ſimilar officer, is bound to keep the peace, and may break open doors to ſuppreſs an affray, or apprehend the perſons fighting, and may either carry them before a magiſtrate, or impriſon them by his own authority, till the heat is over, and may perhaps then make them find ſureties for the peace: but he muſt not lay hands on thoſe who contend only with hot words. If any perſon ſhall, by words only, quarrel in a church or church-yard, the ordinary ſhall ſuſpend him, if a layman from going to church, if a clerk in orders, from the miniſtration of his office during pleaſure: and, if any perſon in ſuch church-yards proceeds to ſmite or lay violent hands upon another, he ſhall be excommunicated; or if he ſtrikes him with a weapon, or draws any weapon with intent to ſtrike, he ſhall, beſides excommunication, (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. *Two* perſons may conſtitute an affray: but,

*Three* perſons or more will conſtitute a *riot*, *rout*, or *unlawful aſſembly*. An unlawful aſſembly, is the meeting of three or more, to do an unlawful act, though they part again without any attempt towards it, and is puniſhable at Common Law, if the numbers aſſembled are more than three and leſs than twelve, by fine and impriſonment. A meeting of twelve perſons may make the offence, as we have juſt ſeen, capital, according to the circumſtances. A rout is, where three or more aſſemble to do an unlawful act upon a common quarrel, ſuch as breaking down fences, upon a right of way or common claimed; and making ſome advances towards it. A riot, is where three or more actually do an unlawful act of violence, even with or without a common cauſe of quarrel; as to beat a man, kill game in another's liberty, &c. or even to do a lawful act in a riotous manner, ſuch as removing a nuiſance: the puniſhment for a riot or rout, is fine and impriſonment at Common Law, to which, in very atrocious caſes, the pillory is ſometimes added. If a jury acquit all but two in a riot, thoſe two cannot be guilty, there muſt be three to conſtitute guilt. Any two juſtices, together with the ſheriff or under-ſheriff of the county, may come with the *poſſe comitatus*, if need be, and ſuppreſs any ſuch riot, aſſembly or rout, arreſt the rioters, and record upon the ſpot the nature and circumſtances of the whole tranſaction: which record alone ſhall be a ſufficient conviction of the offenders. On this ſtatute it is held, that all perſons, noblemen, and others, except women, clergymen, perſons decrepid, and minors under fifteen, are bound to attend the juſtices in ſuppreſſing a riot, on pain of fine and impriſonment: and that any battery, wounding, or killing the rioters, that may happen in ſo doing, is juſtifiable.

Not more than twenty names ſhall be ſigned to any petition to the King, or either houſe of parliament, for any alteration of matters eſtabliſhed by law, in church or ſtate; unleſs the contents thereof be previouſly approved, in the county, by three juſtices, or the majority of the grand-jury at the aſſizes or quarter-ſeſſions; and in London, by the lord mayor, aldermen, and common council; and, no petition ſhall be delivered by a company of more than ten perſons, on pain, in either caſe, of incurring a penalty, not exceeding one hundred pounds, and three months impriſonment. So near is *tumultuous petitioning* a-kin to rioting.

Violently taking or holding poſſeſſion of lands and tenements, with menaces, force and arms, without the authority of law, called *forcible entry or detainer*, is puniſhable. All forcible entries

tries are puniſhed with impriſonment and ranſom at the King's will, and, upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more juſtices of the peace taking ſufficient power of the county, may go to the place, and there record the force upon his own view, as in caſe of riots; and upon ſuch conviction may commit the offender to goal, till he makes fine and ranſom to the King. And further, the juſtice or juſtices have power to ſummon a jury, to try the forcible entry or detainer complained of; and if the ſame be found by that jury, then, beſides the fine on the offender, the juſtices ſhall make reſtitution, by the ſheriff, of the poſſeſſion, without enquiring into the merits of the title; and the ſame may be done by indictment at the general ſeſſions; but this does not extend to ſuch as endeavour to maintain poſſeſſion by force, where they, themſelves, or their anceſtors have been in the peaceable enjoyment of the lands and tenements for three years immediately preceding. Holding over by force, where the tenant's title was under a leaſe, now expired, is held to be forcible detainer. If a forcible entry or detainer ſhall be made by three perſons or more, it is a riot, and puniſhable as ſuch.

Under the head of forcible detainer, I may mention that of an inn-keeper detaining the goods or perſon of his gueſt, for the reckoning, or the horſe of his gueſt, till he is paid for his food, and this he may do, without any agreement for that purpoſe; but ſuch a horſe may be detained only for his own meat, and not for the meat of the gueſt, or that of any other horſe, nor can the inn-keeper uſe ſuch horſe, ſuch detention being in the nature of a diſtreſs: by the cuſtom, however, of London and Exeter, but in no other place, a horſe left at an inn, and eating out his own price, the inn-keeper may take him as his own, on the reaſonable appraiſement of four of his neighbours; but by the cuſtom of the realm, he hath no power to ſell the horſe. If any inn-keeper, alehouſe-keeper, victualler, or ſutler, in giving any account or reckoning, in writing or otherwiſe, ſhall refuſe or deny to give in the particular number of quarts, or pints, or ſhall ſell in meaſures unmarked: it ſhall not be lawful for him, for default of payment of ſuch reckoning, to detain any goods or other thing belonging to the perſon or perſons from whom ſuch reckoning ſhall be due, but he ſhall be left to his action at law for the ſame.

*Riding* or *going armed* with dangerous or unuſual weapons, is deemed alſo an infringement of the peace, and is puniſhable by impriſonment, during the King's pleaſure, and a forfeiture of the

arms. But it is held, that no perſon is within the meaning, who arms himſelf to ſuppreſs riots, rebels, or enemies; nor is any wearing of cuſtomary arms for ornament, or defence, in ſuch places, and on ſuch occaſions, as the faſhion authorizes, within the words of the ſtatute; nor any man's aſſembling his neighbours and friends in his own houſe, againſt thoſe who threaten to him any violence, his houſe being his caſtle.

*Spreading falſe* and injurious news and *tales* that create jealouſies and enmity between the King and his nobles, or concerning any great man of the realm, is puniſhable at Common Law with fine and impriſonment. So is it by ſeveral ſtatutes. *Falſe* and *pretended prophecies* alarming the people, are equally unlawful and puniſhable, with a fine of one hundred pounds, and one year's impriſonment, for the firſt offence, and a forfeiture of all goods and chattels and impriſonment during life, for the ſecond.

Even exciting others to a breach of the peace is an offence of the ſame kind. *Challenges to fight*, either by word or letter, or to be the bearer of ſuch challenge, are puniſhable with fine and impriſonment, according to the circumſtances. If a challenge ariſes on account of any money won at gaming, or if any aſſault or affray happen on ſuch account, the offender ſhall forfeit all his goods to the crown, and ſuffer two years impriſonment.

*Libels*, in their moſt extenſive meaning, imply any writings, pictures, or emblems of an immoral or illegal tendency; but in the ſenſe we are to conſider them here, they are malicious defamations made public by either printing, writing, ſigns, or pictures, and are deemed a breach of the peace, as they tend to diſturb the public repoſe. In the eye of the law, the communication of a libel, though it be to one perſon only, is a publication of it; of courſe ſending an abuſive, private letter to a man is as much a libel, as if it were openly printed. It is immaterial alſo whether the ſubject matter of the libel be true or falſe, it being the provocation that is puniſhable, and not merely the falſity, though the falſity is an aggravation of the crime. In a civil action, we ſay that a libel muſt appear falſe as well as defamatory, or the party libelled could prove no injury, of courſe, can obtain no compenſation; but in ſuch libels as are conſtrued a breach of the peace, if they tend to provoke wrath, they are criminal. The puniſhment of ſuch a libel, if either the making, repeating, printing, or publiſhing be proved, is a fine, and ſuch corporal puniſhment as the court thinks proper to inflict.

3. Offences againſt public trade are next in order; theſe are owling, ſmuggling, bankruptcy, uſury, cheating, foreſtalling, regrating

regrating, engroſſing, monopolies, carrying on trades unlawfully, and tranſporting and ſeducing artiſts.

*Owling*, ſo called from being committed in the night, is the exportation of wool or ſheep from this kingdom, to the injury of the woollen manufacture. Tranſportation of live ſheep, or embarking them on board any ſhip, is forfeiture of goods, and one year's impriſonment, for the firſt offence, with the loſs of the left-hand at the end of the year, which ſhall be cut off in ſome public market, and there nailed upon the openeſt place, for the ſecond offence, it is felony. Exportation of wool, ſheep, or fullers-earth is ſubject to pecuniary penalties, and the forfeiture of the intereſt of the ſhip and cargo by the owners, if privy; and confiſcation of goods, and three years impriſonment to the maſter and all the ſeamen: and tranſportation for ſeven years, if the penalties be not paid.

*Smuggling*, or the clandeſtine importation of goods without paying the duty, is puniſhed by a variety of ſtatutes, inflicting pecuniary penalties and ſeizure of the goods ſo imported, and adding the guilt of felony with tranſportation for ſeven years upon practices more open, avowed, and atrocious. If three or more perſons ſhall aſſemble, with fire arms or other offenſive weapons, to aſſiſt in the illegal exportation or importation of goods, or in reſcuing the ſame after ſeiſure, or in reſcuing offenders in cuſtody for ſuch offences, or ſhall paſs with ſuch goods in diſguiſe; or ſhall wound, ſhoot at, or aſſault any officers of the revenue, when in the execution of their duty, ſuch perſons ſhall be felons without benefit of clergy. There are ſeveral laws alſo in force, inflicting pecuniary penalties on the buyers or ſellers of ſmuggled or prohibited goods.

*Bankruptcy* we have ſpoken of already: but we may ſubjoin under this head, that if a priſoner, charged in execution for any debt under a hundred pounds, neglects or refuſes, on demand, to diſcover and deliver up his effects for the benefit of his creditors, he is guilty of felony, and is puniſhable with tranſportation for ſeven years.

*Uſury* is the taking unlawful intereſt for the loan of money, of this alſo we have already treated, where we obſerved, that the legal intereſt is five *per cent.* in England, and ſix *per cent.* in Ireland, and all contracts for taking more are void, and the lender ſhall forfeit treble the ſum borrowed: alſo if any ſcrivener or broker takes more than five ſhillings *per cent.* for procuring money, or more than one ſhilling for making a bond, he ſhall forfeit twenty pounds, with coſts, and ſhall ſuffer impriſonment for half a year. To take more than ten ſhillings *per*

*cent.* for procuring any money to be advanced on any life-annuity, is an indictable misdemesnor, and punished with fine and imprisonment; so also is the procuring or soliciting any minor to grant any life-annuity, or to promise or otherwise engage to rectify it, when he comes of age.

*Cheating*, if indicted, as it may be, at Common Law, is punishable by fine and imprisonment, though the readier and more usual method is by levying, on a summary conviction, by distress and sale, the forfeitures inflicted by many acts of parliament passed to punish frauds in trades and traders. Under this head may be reckoned breaking the assize of bread, or the rules respecting it's price and quantity laid down by law, and the offence of selling with false weights and measures. Any deceitful practice by cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory. And if any man defrauds another of any valuable chattels, by colour of any false, privy token, counterfeit letters, or false pretence, or pawns or disposes of another's goods without the consent of the owner, he shall suffer such punishment by imprisonment, fine, pillory, transportation, whipping, or other corporal pains, as the court shall direct. In such impositions and deceits, where common prudence may guard persons against their suffering from them, as selling sixteen gallons of beer for eighteen; selling an unsound horse for a sound one, and the like, the party aggrieved is left to his civil remedy for redress, such offences not being indictable.

*Forestalling* the market, that is, buying or contracting for any merchandize or provisions coming in the way to market; dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price when there, thus making the market dearer, is an offence at Common Law, and punishable with discretionary fine and imprisonment. So is

*Regrating*, that is, enhancing the price of provisions, by buying of corn or other dead provisions in any market, and selling it again in the same market, or within four miles of the place.

*Engrossing* also is a crime at Common Law of equal die, and equal punishment: this is buying up large quantities of corn or other dead provisions, designing to sell them again. So also is engrossing any other commodity, with an intent to sell it at an unreasonable price.

*Monopoly*, in other branches of trade, is a similar offence to engrossing in provisions. Monopolies are declared contrary to law,

law, and void (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions, and except alſo patents concerning printing, ſaltpetre, gun-powder, great ordnance, and ſhot) the puniſhment of which is forfeiture of treble damages and double coſts to thoſe whom they attempt to diſturb; and if monopoliſts procure any action, brought againſt them for theſe damages, to be ſtayed by an extrajudicial order, other than that of the court wherein it is brought, they incur the penalties of a *præmunire*. Combinations of victuallers or artificers, to raiſe the price of proviſions, or any commodities, or the rate of labour, are, by ſeveral ſtatutes, particularly and ſeverely puniſhed, and generally, with the forfeiture of ten pounds, or twenty days impriſonment, with an allowance only of bread and water for the firſt offence; twenty pounds, or the pillory for the ſecond; and forty pounds or the pillory, loſs of one ear, and perpetual infamy, for the third.

*Exerciſing a trade* in any town, without having ſerved an apprenticeſhip for ſeven years, is puniſhable with the penalty of forty ſhillings by the month.

To prevent the *ſeduction* or *tranſportation* of artiſts, which is conſidered as deſtructive of our home-manufactures, it is enacted, that ſuch, as ſo entice or ſeduce them, ſhall be fined one hundred pounds, and be impriſoned three months; and for the ſecond offence ſhall be fined at diſcretion, and impriſoned a year: and the artificers ſo going into foreign countries, and not returning, within ſix months after warning given them by the Britiſh ambaſſador where they reſide, ſhall be deemed aliens, and forfeit all their lands and goods, and ſhall be incapable of any legacy or gift. By another act, the ſeducer incurs a penalty of £ 500. for each artificer contracted with to be ſent abroad, and twelve months impriſonment for the firſt offence: and one thouſand pounds and two years impriſonment for the ſecond. And if any perſon exports any tools or utenſils uſed in the ſilk, linen, cotton, or woolen manufactures, (excepting wool cards to North America), he forfeits the ſame, and two hundred pounds; and the captain of the ſhip (having knowledge thereof) one hundred pounds: and if any captain of a King's ſhip, or officer of the cuſtoms, knowingly ſuffers ſuch exportation, he forfeits one hundred pounds, and his employment, and is for ever made incapable of bearing any public office; and every perſon collecting ſuch tools or utenſils, in order to export the ſame, ſhall, on conviction at the aſſizes, forfeit ſuch tools, and alſo two hundred pounds.

4. The fourth claſs of offences under this head are thoſe againſt the public health, of which there are only two; Breaking of quarantine, and Selling unwholeſome proviſions.

The firſt is felony without clergy. If any perſon infected with the plague, or dwelling in an infected houſe, be commanded by the mayor or conſtable, or other head-officer of his town or vill, to keep his houſe, and ſhall venture to diſobey it, he may be enforced by the watchmen appointed on ſuch melancholy occaſions, to obey ſuch neceſſary command: and if any hurt enſue by ſuch enforcement, the watchmen are thereby indemnified. And farther, if ſuch perſon, ſo commanded to confine himſelf, goes abroad, and converſes in company, if he has no plague-ſore upon him, he ſhall be puniſhed as a vagabond by whipping, and be bound to his good behaviour; but if he has any infectious ſore upon him uncured, he ſhall then be guilty of felony. There are ſtatutes that regulate the mode of performing *quarantine*, making the maſters of ſhips coming from infected places, and diſobeying the directions there given, or having the plague on board and concealing it, guilty of felony without benefit of clergy. The ſame puniſhment is inflicted alſo on perſons eſcaping from the lazarets or places wherein quarantine is to be performed; and on officers and watchmen neglecting their duty; and on perſons conveying goods and letters from ſhips performing quarantine.

The ſale of *corrupted wine*, contagious or *unwholeſome fleſh*, or fiſh bought of a Jew, is prohibited on pain of amercement for the firſt offence; pillory for the ſecond; fine and impriſonment for the third; and abjuration of the town for the fourth. And any brewing or adulteration of wine is puniſhable with the penalty of one hundred pounds, if done by the wholeſale merchant, and forty pounds if done by the vintner or retail trader.

5. The laſt claſs of offences under ſuch as affect the public, are thoſe againſt the *police* or œconomy, that is, the due reputation and domeſtic order of the kingdom. Theſe are clandeſtine marriages, bigamy, ſoldiers or ſailors wandering, gipſies wandering, common nuiſances, idleneſs, luxury, gaming, and killing game.

With reſpect to *clandeſtine marriages*, to ſolemnize marriage in any place beſides a church or public chapel, except by licence from the archbiſhop of Canterbury, or in ſuch church or chapel, without due publication of the banns, or proper licence, renders the marriage void, ſubjects the miniſter ſolemnizing it to felony, puniſhable by tranſportation for fourteen years; and he and his aſſiſtants to a penalty of one hundred pounds. To make

make a falſe entry in a marriage regiſter; to alter it when made; to forge or counterfeit ſuch entry, or a marriage licence, to cauſe or procure, or act or aſſiſt in ſuch forgery; to utter the ſame as true, knowing it to be counterfeit; or to deſtroy or procure the deſtruction of any regiſter, in order to vacate any marriage, or ſubject any perſon to the penalties enjoined, makes the party guilty of felony, without benefit of clergy.

*Bigamy* or *Polygamy*, that is, having more wives or huſbands than one, at one time, is felony. By the Eccleſiaſtical Law, a ſecond marriage, the former huſband or wife being living, is void. If any perſon being married, do afterwards marry again, the former huſband or wife being alive, it is felony, but within benefit of clergy. In this caſe the ſecond wife may be admitted as a witneſs againſt the huſband, ſhe being in fact no wife; and *vice verſâ*, ſo may the huſband. This act, however, has the five following exceptions, in which ſuch ſecond marriage, (though in the firſt three it is void) is not felony. 1. Where either party hath been continually *abroad* for ſeven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been abſent from the other, ſeven years *within* this kingdom, and the other party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce (or ſeparation *a menſâ et thoro*) by ſentence in the eccleſiaſtical court. 4, Where the firſt marriage is declared void by any ſuch ſentence, and the parties looſed *a vinculo*. Or, 5. Where either of the parties was under the age of conſent at the time of his marriage; as in this caſe the ſecond marriage declares a non-aſſent of one of the parties, of courſe, renders the firſt marriage void: unleſs, at the age of conſent, the parties had agreed to the marriage; this would have compleated the contract, and conſequently ſuch ſecond marriage would fall within the act.

*Soldiers* and *mariners* idly *wandering* about the country, or perſons pretending to be ſoldiers or mariners, not having a paſs from a juſtice of the peace, limiting the time of their paſſage; or exceeding the time limited, unleſs they fall ſick on the road; or forging ſuch paſs, are guilty of felony, without benefit of clergy. But if any honeſt freeholder, or other perſon of ſubſtance, will take ſuch ſoldier or mariner into his ſervice, and he abides in the ſame for one year; unleſs licenſed to depart by his employer (who in ſuch caſe ſhall forfeit ten pounds), he ſhall be exempted from the penalty of this act.

If any perſons falling under the denomination of *gipſies*, that is, perſons following no profeſſion, but going about from place

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to place in great companies, and uſing crafty means to deceive the people, telling men's and women's fortunes; deceiving the people of their money, and committing many heinous felonies and robberies; if any ſuch perſons ſhall be imported into this kingdom, the importer ſhall forfeit forty pounds. And if the gipſies themſelves remain one month in this kingdom; or if any perſon being fourteen years old (whether a natural born ſubject or ſtranger) which hath been ſeen or found in the fellowſhip of ſuch gipſies, or which hath diſguiſed him or herſelf like them, ſhall remain in the ſame one whole month, or at ſeveral times, he ſhall be adjudged guilty of felony, without benefit of clergy.

*Common nuiſances* are a public offence, being either the doing of a thing to the annoyance of the people in general, or the neglecting to do a thing which the common good requires; ſuch are obſtructing or omitting to repair highways, bridges, and public rivers; for which the perſons, ſo obſtructing, or omitting to repair when they ought, are indictable. What private nuiſances are, have been ſhewn, All ſuch nuiſances, as, when injurious to private perſons are actionable, *viz.* offenſive trades and manufactures, are, when detrimental to the public, puniſhable by public proſecution, and ſubject to ſuppreſſion and fine, according to the miſdemeſnor. The trade of a *tallow-chandler, brewer*, &c. in a town, is deemed a nuiſance; ſo is a *glaſs-houſe*, or a manufactory for making *noiſome* and *offenſive* liquors, as ſpirit of ſulphur, oil of vitriol, and the like. Keeping of *hogs* in any city or market town is a public nuiſance; ſo are all diſorderly *inns* or *ale-houſes*, *bawdy-houſes*, *gaming-houſes*, unlicenſed *ſtage-plays*, booths and ſtages for *rope-dancers*, *mountebanks*, and the like. Inns indeed, being intended for the lodging and reception of travellers, may be indicted, ſuppreſſed, and fined, if they refuſe to entertain a traveller, without very ſufficient cauſe. All *lotteries* are declared to be public nuiſances, and all grants, patents, or licences for the ſame, to be contrary to law. Making and ſelling of *fire-works* and *ſquibs*, or throwing them about in the ſtreet, is, on account of their danger, deemed a common nuiſance, and, of courſe, puniſhable by fine. Making, keeping, or the carriage of, too large a quantity of *gun-powder*, at one time, or in one place or vehicle, is, tho' not declared a common nuiſance, prohibited under heavy penalties. *Eaves droppers*, or ſuch as liſten under walls, windows, or eaves of houſes, to hearken after diſcourſe, and thereupon to frame ſlanderous and miſchievous tales, are a common nuiſance, indictable at the ſeſſions and puniſhable by fine and finding ſureties for their good behaviour. *Common ſcolds* are alſo a public nuiſance

nuiſance to the neighbourhood; and if any woman be convicted, ſhe ſhall be ſentenced to the ducking-ſtool, that is, to be plunged in water for her puniſhment. Diſturbing a neighbourhood, with a ſpeaking-trumpet in the night, has been deemed a nuiſance. So is a maſtiff, left to go in the ſtreets unmuzzled, a nuiſance. And a monſter of the human kind, ſhewn for money, dead or alive, has been held a miſdemeſnor. A maſter is indictable for a nuiſance done by his ſervant. And the court never admits a perſon convicted of a nuiſance to a ſmall fine, until proof is made of the nuiſance being removed.

*Idleneſs* alſo is a high offence againſt public economy. Idle and diſorderly perſons are puniſhable with one month's impriſonment in the houſe of correction; rogues and vagabonds, with whipping and impriſonment not exceeding ſix months: and incorrigible rogues with whipping and impriſonment not exceeding two years. Breach and eſcape from confinement in one of an inferior claſs, ranks him among incorrigible rogues, and in a rogue (before incorrigible) makes him guilty of felony, and ſubject to tranſportation for ſeven years: and perſons harbouring vagrants are ſubject to a penalty of forty ſhillings, and all expences brought upon the pariſh thereby. Idle and diſorderly perſons are as follow, *viz.* perſons threatening to run away and leave their wives and children to the pariſh; perſons returning unlawfully, without a certificate, to a place from which they have been legally removed by two juſtices; perſons who live idle, refuſing to work for cuſtomary wages, and have not wherewithal to maintain themſelves with, and beggars. By ſtatute, rogues and vagabonds are as follow, *viz.* perſons gathering alms under pretences of loſs by fire, or other caſualty; perſons collecting from priſons, goals, or hoſpitals; fencers; bearwards; ſtrolling players, or fiddlers; juglers; gipſies; fortune-tellers; gamblers; perſons running away from their wives and children, leaving them to the pariſh; pedlars not licenſed; perſons wandering about, lodging in barns, &c. not giving a good account of themſelves; wandering ſoldiers and ſeamen, without certificates, and all other wanderers and beggars. Incorrigible rogues are ſuch as collect ends of yarn or the refuſe pieces of woollen goods, which the law puniſhes, to prevent abuſes in the woollen manufacture; perſons apprehended as rogues and vagabonds, and flying in the face of juſtice, or ſuch perſons eſcaping from priſon before the expiration of their confinement, and all rogues and vagabonds convicted of a ſecond offence. Ten ſhillings reward is allowed to private perſons for apprehending any rogue or vagabond; and a penalty of

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ten ſhillings is inflicted on ſuch as neglect to apprehend them, when ordered by a magiſtrate.

*Luxury*, or extravagant expences in dreſs, diet, &c. may be claſſed alſo under the head of public œconomy. Formerly there were many laws to reſtrain exceſs in apparel as a public evil; but one reſpecting diet exiſts at preſent unrepealed, which enacts, that no man ſhall be ſerved at dinner or ſupper with more than two courſes; except upon ſome great holiday there ſpecified, in which he may be ſerved with three. And, under this head, I'll take the opportunity to mention, that for the encouragement of fiſheries and the increaſe of cattle, no perſon ſhall eat any meat without a licence, on Fridays, Saturdays, the embering days, or in Lent, nor on any other fiſh day, on pain of forfeiting twenty ſhillings, or being impriſoned one month.

*Gaming* is univerſally allowed to be a public evil. To reſtrain this, among the lower claſs of people, all but gentlemen are prohibited the games of tennis, tables, cards, dice, bowls, coits, &c. unleſs in the time of Chriſtmas, under certain pecuniary pains and impriſonment; and pecuniary penalties may be inflicted as well upon the maſter of any public houſe, wherein ſervants are permitted to game, as upon the ſervants themſelves who are found to be gaming there. In more exalted life, if any perſon, by playing or betting, ſhall loſe more than a hundred pounds at one time, he ſhall not be compellable to pay the ſame; and the winner ſhall forfeit treble the value, one moiety to the King, and the other to the informer. All bonds and other ſecurities, given for money won at play, or money lent at the time to play withal, ſhall be utterly void: all mortgages and incumbrances of lands made upon the ſame conſideration, ſhall be and enure, to the uſe of the heir of the mortgagor: if any perſon, at one time, loſes ten pounds at play, he may ſue the winner, and recover it back by action of debt at law; and in caſe the loſer does not, any other perſon may ſue the winner for treble the ſum ſo loſt; and the plaintiff, in either caſe, may examine the defendant himſelf upon oath; (money loſt at a horſe or foot-race falls within this act); and in any of theſe ſuits no privilege of parliament ſhall be allowed. Alſo, if any perſon cheats at play, and, at one time, wins more than ten pounds, or any valuable thing, he may be indicted thereon, and ſhall forfeit five times the value, ſhall be deemed infamous, and ſuffer ſuch corporal puniſhment as in caſe of wilful purgery. By ſeveral ſtatutes, all private lotteries by tickets, cards, or dice (and particularly the games of faro, baſſet, ace of hearts, hazard, paſ-

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ſage, rolly-polly, and all other games with dice, except back-gammon) are prohibited on pain of forfeiting two hundred pounds by him that ſhall erect ſuch lotteries, and fifty pounds a time by the players. Public lotteries are alſo prohibited under heavy, pecuniary penalties, unleſs by authority of parliament, and all kinds of ingenious devices under the name of ſales or otherwiſe, which, in the end, are equivalent to lotteries. To prevent the multiplicity of horſe-races, it is enacted, That no plates or matches, under fifty pounds value, ſhall be run, on pain of two hundred pounds penalty, to be paid by the owner of each horſe running, and one hundred pounds by ſuch as advertiſe the plate. If any man be convicted upon the information or indictment of winning or loſing at any ſitting ten pounds, or twenty pounds within twenty-four hours, he ſhall forfeit five times the ſum. Two juſtices may examine any perſon reported to live by gaming, and if he does not make it appear to the contrary, may bind him to good behaviour for twelve months; and, in default of his giving ſufficient ſecurity, may commit him to the common goal till he does: and if he loſes at any ſitting twenty ſhillings, during the time he is bound, ſuch playing ſhall be deemed a forfeiture of the recognizance.

With reſpect to killing of *game*, we have had occaſion to mention it before, where I ſhewed that no qualification will entitle a man to the liberty of ſporting, unleſs he has a grant of free-warren. Certain qualifications will indeed exempt him from the penalties of the game-laws, but he will nevertheleſs be a treſpaſſer, and be liable to be ſued for ſuch treſpaſs in a court of law. The qualifications alluded to, are by the Statute Law, as follow. 1. Having a freehold eſtate of one hundred pounds *per annum*; 2. A leaſehold, for ninety-nine years, of one hundred and fifty pounds a year; 3. Being the ſon and heir apparent of an eſquire, or perſon of ſuperior degree; 4. Being the owner or keeper of a foreſt, park, chaſe, or warren; and, 5. Having a licence for ſhooting. Unqualified perſons tranſgreſſing theſe laws by killing game, keeping engines for that purpoſe, or even having game in their cuſtody; or perſons, however qualified, that kill game, or have it in poſſeſſion, at improper ſeaſons of the year, or unſeaſonable hours of the day or night, on Sundays or on Chriſtmas day, are ſubject to various, pecuniary penalties and corporal puniſhment by different ſtatutes, on any of which, but only on one at a time, juſtices of the peace may convict in a ſummary way, or, in moſt of them, proſecutions may be carried on at the aſſizes. And no perſon, however

however qualified to kill, may ſell, or expoſe to ſale, any game, on pain of like forfeiture, as if he had no qualification.

We come now to the laſt claſs of offences, which are puniſhable by the laws of this country; namely, thoſe which, in a more particular manner, are injurious to individuals. Theſe crimes, then, againſt individuals, are chiefly of three kinds; 1. Againſt their perſons; 2. Their habitations; and, 3. Their property.

I. Of crimes injurious to the perſons of individuals, the principal one is homicide, that of taking away life, which no man is juſtifiable in depriving himſelf or another of. Now homicide is of three kinds; *juſtifiable*, *excuſable*, and *felonious*.

1. Juſtifiable homicide may be ſubdivided alſo into three kinds; that from neceſſity; that for the purpoſes of public juſtice; and that for the prevention of any atrocious crime.

Such as is owing to unavoidable *neceſſity*, without any will, intention, or deſire, and without any inadvertency or negligence in the party killing, is certainly without any degree of guilt: as, for example, where a ſheriff or executioner puts a malefactor to death, by virtue of his office. But to juſtify ſuch homicide, the law muſt *require* it; of courſe, wantonly to kill a felon or a traitor, attainted or outlawed, uncompelled and extrajudicially, is murder; nay, if judgment of death be paſſed by a judge not properly authorized, ſuch judge is guilty of murder. Legal judgment alſo muſt be executed by the proper officer or his deputy; ſo that was even the judge, or any other perſon to do it, of his own head, it would be murder. The execution muſt alſo be conformable to the ſentence of the court; for ſhould a ſheriff behead one adjudged to be hanged, or hang one ſentenced to be beheaded, it would be murder. The King, indeed, may remit all but the beheading in caſes of treaſon; but this is no introduction of a new puniſhment; where the judgment, however, is to be *hanged*, it is held that the King cannot even order a peer to be beheaded.

Homicide is alſo juſtifiable when committed for the *purpoſes* or advancement of *public juſtice*, as, 1. Where a perſon aſſaulting or reſiſting, is killed by an officer in the execution of his office; 2. Where a man charged with felony, and reſiſting, is killed by any officer or private perſon attempting to take him; 3. Where officers ſhould kill any one, in their endeavouring to diſperſe a mob, as in caſes of riot. 4. A goaler or officer, in his own defence, to prevent an eſcape, may juſtifiably kill priſoners in a goal, or going to goal, that aſſault ſuch goaler in his office. 5. Treſpaſſers in foreſts, parks, chaſes, or warrens, that will

will not ſurrender themſelves to the keepers may be put to death. But, in all theſe caſes, there muſt be an apparent neceſſity on the officer's ſide, *viz.* that the party could not otherwiſe be arreſted or taken, the riot could not be ſuppreſſed, the priſoners could not be kept in ſafe cuſtody, or the deer-ſtealers could not otherwiſe but eſcape.

Homicide committed for the *prevention* of any *atrocious crime* is alſo juſtifiable. Thus, if any perſon attempts a robbery or murder of another, or attempts to break open a houſe in the *night-time* (this extends alſo to an attempt to burn it), and ſhall be killed in ſuch attempt, the ſlayer ſhall be acquitted. But it does not extend to any crime unattended with force, as picking of pockets; or to the breaking open any houſe in the *day-time*, unleſs it carries with it an attempt of robbery alſo. A woman is juſtified in killing one who attempts to raviſh her, ſo is the huſband and father a man, who attempts a rape upon his wife or daughter: but not, if he finds them in adultery by conſent. In ſhort, where a crime, in itſelf capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. In the caſes hitherto mentioned, the killer is perfectly without blame, and is rather to be commended than cenſured. But,

2. Excuſable homicide, though not puniſhed by our laws, is ſcarcely juſtifiable. This is of two kinds, by accident and in ſelf-defence.

Homicide by *accident*, is where a man doing a lawful act, without any intention of hurt, unfortunately kills another; as where the head of an axe, with which a man is at work, flies off and kills a ſtander-by, or where a perſon is accidently killed, by a man qualified to keep a gun, and ſhooting at a mark; or where death is the conſequence of a parent's moderately correcting it's child, a maſter his apprentice or ſcholar, or an officer inflicting corporal puniſhment on a criminal; but if the correction be immoderate, or inflicted with improper inſtruments, and death enſues, the act would, in ſome caſes, be manſlaugher, and others, according to circumſtances, murder; for immoderate correction is unlawful. Boxing and cudgelling are unlawful diverſions, of courſe, death happening from either would be manſlaughter. To whip another's horſe, ſo that he runs over a child and kills him, is held to be accidental in the rider, but manſlaughter in the perſon who whips him. In a word, it is the lawfulneſs of the act that makes homicide excuſable: if the act be unlawful, and death be the conſequence, though no murder was deſigned, the crime will be manſlaughter: ſuch,

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for example, when it happens from throwing ſtones in a town, or the mercileſs diverſion of cock-throwing. Homicide by accident preſumes negligence and want of ſufficient caution, of courſe, cannot be altogether faultleſs.

Homicide in *ſelf-defence* is alſo rather excuſable than juſtifiable. The right of natural defence does not imply a right of attacking, the laws being the proper reſource for redreſs; no man therefore can juſtify the killing another in his own defence, unleſs certain and immediate ſuffering would be the conſequence of waiting the aſſiſtance of the law. As homicide in ſelf-defence generally ariſes from caſual quarrels, and ſince in quarrels, both parties may be, and uſually are, in ſome fault; if two perſons fight, and one kills the other, the law will not deem the ſurvivor entirely guiltleſs. Where both parties are actually fighting, at the time the mortal ſtroke is given, the killer is guilty of manſlaughter, becauſe the act of fighting is illegal; but if the killer hath not begun to fight, or having begun, endeavours to decline, and afterwards, being cloſe preſſed by his antagoniſt, kills him in order to ſave himſelf, this is homicide excuſable by ſelf-defence. For a man, who kills another in a ſudden quarrel, to ſtand acquitted, it muſt appear that he retreated as far as he ſafely or conveniently could, to avoid the violence of the attack, before he turned upon his aſſailant, and that not to watch his opportunity, but from a real unwillingneſs to ſhed blood: to turn thus from an enemy in the midſt of an engagement would be cowardice; but the law countenances no ſuch point of honour, at any other time. Neither will the law permit a man, under the colour of ſelf-defence, to ſcreen himſelf from the guilt of murder. For, if two perſons, *A* and *B*, agree to fight a duel, and *A* makes the firſt attack; though *B* retreats as far as he ſafely can, and then kills *A*, it is murder, becauſe of the preconcerted deſign. But ſhould *A*, upon a ſudden quarrel, aſſault *B* firſt, and on *B*'s returning the aſſault, abſolutely fly from *B*, but being driven to the wall, turn again and kill *B*, ſome are of opinion, it would be excuſable homicide, though others have thought differently, as the extremity, to which *A* was reduced, aroſe from his own fault. Maſters and ſervants, parents and children, huſbands and wives, being allowed to ſtand upon the reciprocal defence of each other, either killing an aſſailant, in the neceſſary defence of the other reſpectively, will be homicide excuſable or *ſe defendendo*.

Where, in the caſe of two perſons ſhipwrecked, and getting on the ſame plank incapable of ſaving them both, one ſhall thruſt

thruſt the other off, whereby he is drowned, the great law o ſelf-preſervation will juſtify the act. But,

3. Felonious homicide is of a very different nature, and this whether it be the murder of one's ſelf or another.

Suicide or ſelf-murder is a crime too frequently committed with cool deliberation. Nay, if a lunatic kills himſelf in a lucid interval, he is as much guilty of ſelf-murder as another man. Self-murder, like other felonies, admits of acceſſories before the fact; for if one man perſuades another to kill himſelf, and he does it, the perſuader is guilty of murder. If a man attempting to kill another, runs upon the ſword of his antagoniſt; or ſhooting at another, the gun burſts and kills himſelf; from the unlawfulneſs of the act, he is a *felo de ſe*. But the party muſt be of years of diſcretion and in his ſenſes, or elſe it is no crime.

The puniſhment inflicted on a ſelf-murderer, can be only on his reputation and property. The law ordains that he be ignominiouſly buried in the highway, with a ſtake driven through his body, and that his goods and chattels be forfeited to the King. And this forfeiture takes place at the time of the act done in the felon's life-time. By the rubrick of the Common-prayer before the burial ſervice (confirmed by ſtatute), perſons who have laid violent hands upon themſelves ſhall not have that office uſed at their interment.

In killing another perſon, there are two degrees of guilt, dividing the offence into *manſlaughter* and *murder*. Manſlaughter (when voluntary), ariſes from the ſudden heat of the paſſions, murder from the wickedneſs of the heart.

*Manſlaughter* is defined to be the unlawful killing of another, without any kind of malice, and may be either voluntary, upon a ſudden quarrel; or involuntary, in the commiſſion of ſome unlawful act.

Firſt, for the *voluntary* branch, if two perſons fight upon a ſudden quarrel, and one kills the other, it is manſlaughter; and it is equally ſo, if, on ſuch a quarrel, they each fetch their ſwords, and go immediately out into a field and fight, this being conſtrued a continued heat of the ſame paſſion. So, if a man be greatly exaſperated, as by pulling his noſe, or ſome other great indignity, and inſtantly kills the aggreſſor, it would be manſlaughter: for, there being no neceſſity to kill the aſſailant in ſelf-preſervation, it could not be deemed *ſe defendendo*. But in all homicides, on provocation, if there be time for the paſſion to cool, and reaſon to interpoſe, ſuch as agreeing to go out the next day, and the perſon ſo provoked ſhould kill the aggreſſor

aggreſſor afterwards, it would be held a deliberate revenge and murder. If a man finds another in the act of adultery with his wife, and kills him inſtantly, it is manſlaughter, but it is ſo low a degree of the crime, that in a caſe of this kind, the court ordered the burning to be lightly inflicted, as there could not be a greater provocation.

*Involuntary* manſlaughter ariſes from the commiſſion of an unlawful act, or a lawful act done in an unlawful manner. If a man in boxing or cudgelling with another, kills his antagoniſt, it is manſlaughter, becauſe the act of boxing or cudgelling is unlawful. If a workman flings a ſtone or piece of timber from a houſe-top into the ſtreet, and kills a man below, it may be accident, manſlaughter, or murder, according to the circumſtances. If he did it in a country village, where few paſſengers are paſſing, calling out to all people to have a care, it would be deemed an accident; but was ſuch a thing to happen in London, or other populous town, where numbers are paſſing and repaſſing, it would be manſlaughter, even though he gave loud warning; but again, ſhould he know of their paſſing and give no warning at all, he would be adjudged guilty of murder, it being malice againſt all mankind. In ſhort, where voluntary killing happens in conſequence of an unlawful act, it will be either manſlaughter or murder, according to the circumſtances of the act done: if it is in the proſecution of a felonious intent, or in it's conſequence tended to bloodſhed, it would be murder; but was no more intended than a treſpaſs, it will be only manſlaughter. However, to prevent accidents on the water, it is enacted, That if any waterman, between Graveſend and Windſor, receives into his boat a greater number of perſons than the act allows, (ſeven) and any paſſenger ſhall then be drowned, ſuch waterman is guilty, not of manſlaughter only, but felony, and ſhall be tranſported.

Though the crime of manſlaughter amounts to felony, it is within the benefit of clergy, and the puniſhment is burning in the hand, and forfeiture of goods and chattels. But there is one ſpecies of manſlaughter from which the benefit of clergy is taken away: for, where one thruſts or ſtabs another, not then having a weapon drawn, or who hath not then firſt ſtricken the party ſtabbing, ſo that he dies thereof within ſix months after, the offender ſhall not have the benefit of clergy, though he did it not of malice aforethought. This ſtatute was made on account of the frequent ſtabbing with ſhort daggers, on quarrels between the Scotch and Engliſh, at the acceſſion of James I. and ſhould have expired with the miſchief: but the humanity of the

law

law ſo favourably conſtrues this ſtatute, when in behalf of the offender, and ſo ſtrictly when againſt him, that ſtabbing now ſtands almoſt as it did at Common Law. For ſtabbing an adultreſs is deemed manſlaughter only; and if the perſon killed had ſtruck at all before the mortal ſtroke given, though in the preceding quarrel the ſtabber might have given the firſt blow, yet it is held not to fall within this ſtatute. So it has been reſolved, that killing, by throwing a hammer, or other blunt weapon, is not within the ſtatute, and it is doubted whether a ſhot with a piſtol be ſo or not. But if the perſon killed had a cudgel in his hand, or had thrown a pot or a bottle, or diſcharged a piſtol at the perſon ſtabbing, he is held to have a weapon drawn on his ſide, within the words of the ſtatute.

We are now to conſider the crime of deliberate *murder*.

Lunatics and infants are incapable of committing murder, unleſs in caſes where they ſhew a conſciouſneſs of doing wrong: but drunkenneſs is no excuſe; nor lunacy, if the act be committed in a lucid interval.

To conſtitute murder, it muſt be alſo without excuſe; and the party muſt be actually dead; for a bare aſſault without a deſign to kill, is only a great miſdemeſnor. There are various modes of killing; but if a perſon be indicted for any one mode, ſuppoſe *poiſoning*, he cannot be convicted, by evidence of a totally different mode, as for example, *ſhooting* or *ſtarving*: but where they differ only in circumſtances, as if the wound be alledged to be given with a ſword, and it turns to have been with a knife, an axe, or a ſtaff, the difference is immaterial. If a man does any act of which the probable conſequence may be, and eventually is, death, ſuch killing may be murder, though no ſtroke be ſtruck by himſelf, or any murder intended; where an unnatural ſon expoſed his ſick father to the air againſt his will, of which he died; where a harlot laid her child under leaves in an orchard, and a kite ſtruck it and killed it; and where certain pariſh-officers ſhifted a child from pariſh to pariſh, till it died for want of care and ſuſtenance. If a man who has a beaſt uſed to do miſchief, and he, knowing it, *ſuffers* it to go abroad, and it kills a perſon, he is guilty of manſlaughter; but if he deſigningly *turns it looſe*, though it is barely to make what is called ſport, it is murder. If a regular phyſician or ſurgeon gives his patient a draught or plaiſter in order to cure him, and it unfortunately kills him, it is deemed only accident, however he may be liable to a civil action for his neglect or ignorance; but if he be not regularly bred, he will be guilty of manſlaughter, at the leaſt. To make the killing murder, the party muſt die within

within a year and a day after the injury received, and in the computation, the whole day on which the hurt was given ſhall be reckoned the firſt.

To kill a child in it's mother's womb is not murder, but a great miſpriſion; but if the child be born alive, and dies of the potion or bruiſes it received in the womb, it is held to be murder, in ſuch as adminiſtered the potion or gave the bruiſes. If any woman be delivered of a child, which, if born alive, would by law be a baſtard, and endeavours privately to conceal it's death, by burying the child or the like, the mother ſo offending ſhall ſuffer death as in the caſe of murder, unleſs ſhe can prove, by one witneſs at leaſt, that the child was actually born dead: but from the ſeverity of this ſtatute, it has been cuſtomary, of late years, to require ſome kind of preſumptive evidence, that the child was born alive, before the other conſtrained preſumption (that the child whoſe death is concealed was therefore killed by it's parent) is admitted to convict the mother. A woman's confeſſing herſelf with child, before delivery, or calling or knocking for help in child-birth, will relieve her from this ſtatute; if nothing appears to prove that the child was born alive.

Laſtly, to make killing murder, it muſt be committed with malice aforethought; and it may be either expreſſed or implied. Expreſſed malice is from deliberation and deſign; and this takes in the caſe of duelling, where both parties meet with a murderous intent. Alſo, if one, upon a ſudden provocation, beats another in a cruel manner till he dies, though he did not intend to kill him, the law deems it done by expreſs malice, or evil deſign, and adjudges it murder: as in the after caſes; when the following perſons were thus killed; by a park-keeper's tying a boy, that he found ſtealing wood, to a horſe's tail, and dragging him along the park; by a maſter beating a ſervant with an iron bar, in order to correct him; and by a ſchoolmaſter ſtamping upon his ſcholar's belly. The man alſo is guilty of murder, who goes deliberately among a crowd of people, with a horſe uſed to ſtrike, or who fires a gun cooly among them, provided death be the conſequence; this being univerſal malice. So a man, if he reſolves to kill the next man he meets, and does it, though he does not know him: and if two or more meet to do an unlawful act, of which the probable conſequence might be bloodſhed; as to beat a man, commit a riot, rob a park, and one of them kills a man; it is murder in them all, becauſe of the unlawfulneſs of the act, and the evil intended beforehand.

Implied malice, is where a particular enmity can be proved, as where one man wilfully poiſons another. No affront, by words

words or geſtures only, is ſufficient provocation, ſo as to extenuate ſuch acts of violence as endanger life; of courſe, if a man kills another ſuddenly, without a conſiderable provocation, the law implies malice. But if the perſon ſo provoked had unfortunately killed the other, by beating him ſo as only to ſhew he meant to chaſtiſe him, and not to kill him, the law adjudges it to be manſlaughter only; but if the beating was ſevere and in cool blood, by way of revenge, it is murder. So if one kills an officer of juſtice in the execution of his duty, or any of his aſſiſtants, endeavouring to preſerve the peace, or any private perſon ſtriving to ſuppreſs an affray, or apprehend a felon, knowing his authority or the deſign with which he interferes, the law implies it to be malice, and the killer will be guilty of murder. Alſo where a priſoner dieth by the dureſs of the gaoler, the law implies malice, by reaſon of the cruelty. And if one deſigns to commit felony, and unintentionally kills a perſon, it is murder. Thus, if *A* ſhoots at *B*, and miſſes him, but kills *C*, it is murder, becauſe of the previous felonious intent. It is the ſame, if *A* lays poiſon for *B*, and *C* takes it, and it kills him, though *A* had no malice againſt *C*. So alſo if one gives a woman with child a medicine to procure abortion, and it operates ſo violently as to deſtroy the woman, it is murder in the perſon who gave it. In a word, all homicide amounts to murder, unleſs *juſtified* by the command or the permiſſion of the law; *excuſed* on the account of accident or ſelf-defence, or *alleviated* into manſlaughter by the circumſtances we have mentioned, which circumſtances of juſtification, excuſe, or alleviation, it is incumbent on the priſoner to make out to the ſatisfaction of the court and jury.

The puniſhment for murder is, That the judge who tries the priſoner, ſhall pronounce ſentence immediately after conviction, unleſs he ſees cauſe to poſtpone it: and ſhall, in paſſing ſentence, direct him to be executed on the next day but one (unleſs the ſame ſhall be Sunday, and then on the Monday following) and that his body be delivered to the ſurgeons to be diſſected and anatomized; and that the judge may direct his body to be afterwards hung in chains, but in no wiſe to be buried without diſſection, and during the interval between ſentence and execution, the priſoner ſhall be kept alone, and ſuſtained with only bread and water. But the judge, on good and ſufficient cauſe, is empowered to reſpite the execution and relax the other reſtraints of this act.

A ſervant killing his maſter (whether he lives with him, or has left him, in a grudge conceived againſt him during his ſervice)

vice) a wife, her husband (though divorced *a mensâ et thoro*) or a clergyman his diocesan, metropolitan, or bishop that ordained him, is guilty of petty-treason; the punishment for which is, to be drawn and hanged. A person indicted for petit-treason, may be acquitted thereof, and yet found guilty of manslaughter or murder.

Other crimes against the persons of individuals, are nine, *viz.* Mayhem; Stealing an heiress; Rape; Sodomy; Assaults; Batteries; Wounding; False Imprisonment; and Kidnapping; the first four are felonies, the rest merely misdemesnors.

1. *Mayhem*, or maiming, as a civil injury, was considered in the preceding book, but as a breach of the peace, and of course criminal, it remains to be treated of here. We before defined mayhem to be violently depriving a man of the use of such of his members, as render him less able to defend himself, and annoy his adversary; such as castration; disabling a man's hand or finger: or striking out his eye or fore-tooth: the punishment for which at Common Law is only fine and imprisonment; but castration is held to be felony. Cutting off his ear or nose, as they do not weaken a man, are not considered as mayhem at Common Law.

To cut out a man's tongue or put out his eyes, if done of malice prepense, is felony. If a man shall maliciously cut off the ear of any of the King's subjects, he shall not only forfeit treble damages to the party grieved, to be recovered by action of trespass at Common Law, but also ten pounds by way of fine to the King. But if any person shall, of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or disable any limb or member of any person, with intent to maim or disfigure him, such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy. If a man attacks another with an intent to murder him, but only maims him; the offence is death. So is it to shoot any person, wilfully and maliciously. If a man maims himself, for a better pretence to beg, or that he may not be impressed for a soldier, he may be indicted and fined.

2. *Stealing an heiress* is also a felonious offence; for, if any person shall for lucre take any woman, having substance either in goods or lands, or being heir-apparent to her ancestors, contrary to her will, and she afterwards shall be married to such misdoer, or, by his consent, to another, or defiled; such person, his procurers and abettors, and such as knowingly receive such

ſuch woman, ſhall be deemed principal felons, and with their acceſſories *before* the fact, ſhall not have the benefit of clergy.

In the conſtruction of this ſtatute it hath been determined, that no taking away falls within the act, unleſs the woman is heir-apparent, or has ſubſtance either real or perſonal, and unleſs it be againſt her will; and it muſt alſo appear that ſhe was afterwards married or defiled; and it is held, that though the marriage or defilement might be by her ſubſequent conſent, yet if the firſt taking away was againſt her will, it is felony; and alſo, if ſhe be originally taken with her own conſent, yet if ſhe afterwards refuſe to continue with the taker, and be forced againſt her will, ſhe may, from that time, as properly be ſaid to be taken againſt her will, as if ſhe had never given her conſent at all; for, till ſhe was forced, ſhe was miſtreſs of her own actions. The evidence of a woman thus taken away and married, is admitted againſt her huſband, he not being her legal huſband.

If any perſon, above the age of fourteen, unlawfully ſhall convey or take away any woman-child unmarried, within the age of fourteen years, from the poſſeſſion and againſt the will of the father, mother, guardian, or governors, he ſhall be impriſoned two years, or fined at the diſcretion of the juſtices: and if he deflowers ſuch woman-child, or, without the conſent of parents, contracts matrimony with her, he ſhall be impriſoned five years, or fined at the diſcretion of the juſtices, and ſhe ſhall forfeit all her lands to her next of kin, during the life of her ſaid huſband.

3. Raviſhing any woman above twelve years of age, is felony without benefit of clergy; as is alſo the wickedneſs of carnally abuſing any woman-child under the age of ten years, let it be with her conſent or with it. But carnally knowing a woman-child between the ages of ten and twelve, either with her conſent or without, ſubjects the offender to two years impriſonment, and a fine at the King's will. The offence of rape is no way mitigated, by ſhewing that the woman at laſt yielded to the violence, if ſuch her conſent was forced by fear of death or dureſs; nor is it any excuſe that ſhe conſented after the fact.

A male child, under the age of fourteen years, is not ſuppoſed capable to commit a rape, and, therefore, cannot be puniſhed for it. And it is held to be felony, to force a common proſtitute, as ſhe may have forſaken that courſe of life.

In trials for rape, the evidence of the party raviſhed is admitted as competent, but the credibility of ſuch evidence reſts with the jury; whoſe duty it is to enquire minutely into her character; not to give much credit to a ſtale ſtory; to examine

whether ſhe made any outcries: whether ſhe diſcovered the offence ſoon after, and ſought out the offender to puniſh him; and whether the offender fled, *&c.* in order to corroborate her evidence. If the rape be on an infant under twelve years of age her evidence may ſtill be admitted on oath, if ſhe knows the nature of an oath, and even if ſhe does not, ſhe may be heard unſworn, though this alone is not ſufficient to convict the offender; nay, the law allows what the child told her mother or other relations, to be given in evidence, as the caſe admits frequently of no better proof.

4. In *ſodomitical* practices, or the crime againſt nature, committed either with man or beaſt, it ought to be ſtrictly and impartially proved. Both parties, if arrived at the age of diſcretion, are equally puniſhable, and are guilty of felony, without benefit of clergy.

5, 6, 7. The next offences are miſdemeſnors only. *Aſſaults*, *batteries*, and *wounding*, have been already conſidered as injuries, for which ſatisfaction may be obtained in a court of law; but conſidered as a breach of the peace, they are indictable and puniſhable with fines and impriſonment, and if committed with any very evil deſign, with other ignominious, corporal penalties. For example, intentional aſſaults to commit rape or ſodomy, are uſually puniſhed with heavy fines, impriſonment, and pillory.

There is, however, one ſpecies of battery more penal than the reſt, which is, beating or aſſaulting a clergyman. If any perſon lays violent hands upon a clerk, he may be indicted in the King's courts: and may alſo be ſued before the biſhop, that excommunication or bodily penance may be impoſed; which, if the offender will redeem with money, to be given to the biſhop or the party grieved, it may be ſued for before the biſhop. So that a perſon guilty of ſuch brutal behaviour to a clergyman, is ſubject to three kinds of proſecution, for one and the ſame offence; an indictment for a breach of the peace, for ſuch aſſault and battery; a civil action for the damage ſuſtained; and a ſuit in the eccleſiaſtical court, where penance will be enjoined, and then again for ſuch ſum of money as ſhall be agreed on for taking off the penance.

8. For *falſe impriſonment*, the party injured may have redreſs by a ſuit at law; but as a breach of a peace, the offender may be indicted at the ſuit of the King, and puniſhed by fine and impriſonment. To carry any one by force out of the four northern counties, or impriſon him within the ſame, in order to ranſom him, or make ſpoil of his perſon or goods, is felony without

without benefit of clergy in the principals, and all acceſſories *before* the fact.

9. *Kidnapping*, or the forcible ſtealing away man, woman, or child, from their own country, and ſending them into another, the Common Law puniſhes with fine, impriſonment, and pillory. And if any captain of a merchant-veſſel ſhall (during his being abroad) force any perſon on ſhore, or wilfully leave him behind, or refuſe to bring home all ſuch men as he carried out, if able and deſirous to return, he ſhall ſuffer three months impriſonment. We come now

2dly, To treat of thoſe offences that more immediately affect the *habitations* of individuals, and of theſe there are two, *Arſon* and *Burglary*.

1. *Arſon*, from *ardendo*, is the malicious and wilful burning the dwelling-houſe of another, or the outhouſes that are parcel thereof, though not contiguous thereto, nor under the ſame roof, as barns and ſtables, and is, at Common Law, a felonious offence. Setting fire to one's own houſe, provided one's neighbour's houſe is thereby burnt, but not elſe, is alſo arſon; but by Common Law, the wilful firing of one's own houſe in a town, is a high miſdemeſnor, and puniſhable by fine, impriſonment, pillory, and perpetual ſureties for good behaviour. And if a landlord or reverſioner ſets fire to his own houſe, of which another is in poſſeſſion by leaſe or grant, it is arſon, for, during the leaſe, the houſe is the property of the tenant. Setting fire to a houſe, unleſs it abſolutely burns, does not fall within the deſcription of arſon; nor even a burning, unleſs it be malicious. But any ſervant *negligently* ſetting fire to a houſe or outhouſes, ſhall forfeit one hundred pounds, or be ſent to the houſe of correction for eighteen months. The puniſhment for arſon is death; and that of wilful burning, whether arſon or not, is now made as extenſive as the miſchief.

2. *Burglary*, is breaking into a manſion-houſe at night, in order to commit felony; the puniſhment for which is death; not only in the principals, but alſo in their abettors and acceſſories *before* the fact.

But to conſtitute this crime, it is held that under the term of nocturnal houſe-breaking, if there be day-light or twilight enough left to diſcern a man's face, it is no burglary. It muſt alſo be a *manſion* or dwelling-houſe, provided it be a private houſe, that is broken into; no diſtant barn, warehouſe, or the like, falls within the deſcription; nor does breaking open of houſes where no man reſides; but if it be reſided in ſometimes, though no one be in it, it is ſuffi cient to make it burglary; but

not if the owner has quitted it, without a deſign to return. It is alſo burglary to break into a barn, ſtable, or warehouſe, if ſuch building be part or parcel of the dwelling-houſe, and within the ſame common fence. A chamber in a college, or inn of court, is deemed a manſion houſe; ſo alſo is a room or lodging in any private houſe, if the owner doth not dwell in the houſe, or if he and the lodger enter by different outward doors; but not otherwiſe. The houſe of a corporation, inhabited in ſeparate apartments by the officers of the body corporate, is the manſion-houſe of the corporation and of the reſpective officers. But breaking into a ſhop, the parcel of one's manſion-houſe, which another hires to work or trade in, without ever ſleeping in it, is not burglary; for, by the leaſe, it is ſevered from the reſt of the houſe, and, of courſe, is not the dwelling-houſe of him who occupies the other part. Neither is it burglary to break into a tent or booth at a fair, though the owner may dwell in it; the law regarding only ſubſtantial edifices, a houſe, a church, the wall or gate of a town; breaking into either of which at night, is a burglarious offence.

Then again as to the *manner* in which this crime is committed. What is a breaking into? The houſe muſt be broken into and entered; though it is not neceſſary that both ſhould be done at one and the ſame time: for if the breach be made in one night, and the entry on another, it ſtill is burglary. The breaking muſt be by ſome breach, or at leaſt by taking out the glaſs of a window or door, picking a lock, opening it with a key, lifting up the latch, or unlooſing any other faſtening the owner has provided. Entering by the chimney is held burglarious, that being as much cloſed as the nature of the thing will permit; but entering a window or door left open, is no burglary. Knocking at the door, and when opened, ruſhing in with a felonious intent, is burglarious; ſo is entering a houſe under pretence of taking lodgings, and then robbing the landlord: or procuring a conſtable to gain admittance, in order to ſearch the houſe, and then binding the conſtable and robbing the houſe. So if a ſervant opens and enters his maſter's chamber-door, with a felonious intent; or if any other perſon lodging in the ſame houſe, or in a public inn, opens and enters another's door with ſuch evil deſign; it is deemed a burglary. Nay, if a ſervant conſpires with a robber, and lets him into the houſe by night, it is burglary in both With reſpect to the nature of entry: any, the leaſt degree of it, is held ſufficient, any part of the body, or any inſtrument held in the hand; for example, to ſtep over the threſhold; to put a hand or a hook in at a window to draw out goods;

goods; or piſtol to demand one's money, are all burglarious entries. If a perſon enters into the dwelling houſe of another, without breaking in, either by day or by night, with intent to commit felony; or being in ſuch houſe, ſhall commit felony, and ſhall in the night break out of the ſame, it is burglary.

By committing felony is underſtood robbery, murder, rape, or any other felony; and entering with an *intent* te commit it, whether ſuch intentions be carried into execution or not, provided it be by night, is burglary. Without ſuch felonious intent, breaking and entry is only a treſpaſs. But there are ſeveral ſtatutes that make houſe-breaking, &c. in the day-time, felony alſo, without benefit of clergy, as will be ſhewn under the head of larceny from the houſe. Burglary, however, in any houſe belonging to the plate-glaſs company, with intent to ſteal the ſtock or utenſils, is declared to be ſingle felony only, and puniſhable with tranſportation for ſeven years. Where a man commits burglary, and at the ſame time ſteals goods out of the houſe; it is alſo larceny; and if he be acquitted of the burglary, he may, notwithſtanding, be indicted for the larceny; they being different offences. We come,

3dly. To treat of criminal offences againſt private property, of which there are three, *Larceny*, *Malicious Miſchief*, and *Forgery*.

1. *Larceny* or *theft*, is attended with a breach of the peace, and is of two kinds, *ſimple* and *mixed*. *Simple* larceny is plain theft, accompanied with any other atrocious circumſtance; which, when the goods ſtolen are above the value of twelve pence, is called *grand* larceny; when under that value, *petit* larceny. *Mixed* or compound larceny, has all the properties of the former, but accompanied with either one or both of the aggravations of a taking from one's *houſe* or *perſon*. We will ſpeak of them in their turns.

*Simple larceny* then, is the felonious taking and carrying away the perſonal goods of another. Taking, here implies without the owner's conſent; therefore, no delivery of the goods from the owner to the offender upon truſt, can ground a larceny. If I lend a man a horſe to go a certain diſtance with, and he rides away with it; or if I ſend goods by a carrier, and he does not deliver them, this is, in neither caſe, larceny; but if the carrier opens the package, or pieces of wine I ſend by him, and robs me of part; or if he delivers the goods according to the directions, and then takes them away, he is guilty of larceny: ſo is a man, at market, that rides away with a horſe, whoſe paces he has deſired to try. But, the ſervants of perſons de-

ceaſed, accuſed of embezzling their maſter's goods, may be ſummoned to appear perſonally in the court of King's Bench, to anſwer their maſter's executors in any civil ſuit for ſuch goods; and ſhall, in default of appearance, be attainted of felony. And if any ſervant embezzles his maſter's goods to the value of forty ſhillings, it is felony; except in apprentices and ſervants under eighteen years of age. But if ſuch ſervant was not entruſted with the poſſeſſion, but only had the care of the goods, as the butler of plate, and the ſhepherd of ſheep, &c. the embezzling them is felony at Common Law. So if a gueſt robs his inn or tavern of a piece of plate, it is larceny; for he hath not the poſſeſſion delivered to him. So if a lodger runs away with the goods from his ready furniſhed lodgings. If a man ſteals the goods he has pawned, in order to defraud the pawn-broker, or robs his own meſſenger on the road, with intent to charge the hundred with the loſs, he is as much guilty of larceny, as if the property he ſteals, was that of another man's.

To conſtitute larceny, there muſt not only be a *taking*, but a *carrying away*, and a bare removal of the things ſtolen is a ſufficient carrying; as, if a gueſt ſtealing goods out of an inn, had removed them from his chamber in his way out. This taking and carrying away muſt alſo be *felonious*; for ſhould a ſervant take his maſter's horſe without his knowledge, and bring it home again, or ſhould a neighbour take another's plough, which he finds in the field, and uſe and return it; or ſhould a landlord diſtrain for rent, when none is due, theſe would be treſpaſſes only, but not felonies. The uſual diſcovery of a felonious intent, is where it is clandeſtinely done, or where the party, being charged with the fact, denies it.

The felonious taking and carrying away muſt alſo be of the *perſonal* goods of another, not any part of his *real* property, or it cannot be larceny by the Common Law. Now, however, to ſteal or rip, cut or break, with intent to ſteal, any lead, or iron-bar, rail, gate, or paliſado, fixed to a dwelling-houſe or outhouſe, or in any court or garden thereunto belonging, is felony, ſubject to tranſportation for ſeven years: and to ſteal, damage, and deſtroy underwood or hedges, and the like; to rob orchards or gardens, of fruit growing therein, to ſteal or otherwiſe deſtroy any turneps, potatoes, cabbages, parſnips, peas, or carrots, or the roots of madder, when growing, are by ſeveral ſtatutes puniſhable by whipping, ſmall fines, impriſonment, and ſatisfaction to the party wronged, according to the nature of the offence. Stealing by night any trees, roots, ſhrubs, or plants, to the value of five ſhillings, is felony in the principals,

principals, aiders, and abettors, and in the purchaſers thereof, knowing the ſame to be ſtolen; and ſtealing of any timber-trees, and of any root, ſhrub, or plant, by day or night, is ſubject to pecuniary penalties for the firſt and ſecond offences, and is felony, and ſubject to tranſportation for ſeven years for the third. Stealing ore out of the mines, being part of the freehold, is not larceny, except it be the ore of black-lead, ſtealing of which, or entering the mine with intent to ſteal it, is felony, puniſhable with impriſonment and whipping, or tranſportation, not exceeding ſeven years; and, to eſcape from ſuch impriſonment, or return from ſuch tranſportation, is felony, without benefit of clergy. Stealing of writings belonging to a real eſtate is no felony, as appertaining to the freehold, but a treſpaſs only.

Stealing of bonds, bills, or notes, were not conſidered as larceny, but now, they are conſidered as money, and it is felony to ſteal them. Officers or ſervants of the Bank of England, ſecreting or embezzling any note, bill, warrant, bond, deed, ſecurity, money, or effects, intruſted with them or with the company, are guilty of felony, without benefit of clergy. It is equally criminal in the officers and ſervants of the South Sea Company. And, if any officer or ſervant of the Poſt-office ſhall ſecrete, embezzle, or deſtroy any letter or pacquet, containing any bank-note, or other valuable paper, particularly ſpecified in the act, or ſhall ſteal the ſame out of any letter or pacquet, he ſhall be guilty of felony, without benefit of clergy; or if he ſhall deſtroy any letter or pacquet, with which he has received money for the poſtage; or ſhall advance the rate of poſtage on any letter or pacquet ſent by the poſt, and ſhall ſecrete the money received by ſuch advancement, he ſhall be guilty of ſingle felony. Stealing of treaſure-trove, at Common Law, is larceny, when it has been ſeiſed by the King, or him who has the franchiſe, but not elſe; and plundering or ſtealing from any ſhip in diſtreſs, is felony, without benefit of clergy.

Taking wild animals, unreclaimed, ſuch as deer, hares, conies, from a foreſt, chaſe, or warren, fiſh from an open river or pond, or wild fowl from their natural liberty, comes not under the conſtruction of larceny, at Common Law; but if they are reclaimed or confined, and may ſerve for food, as deer in an encloſed park, fiſh in a trunk, pheaſants in a mew, ſtealing them is larceny. And, now, to hunt, wound, kill, or ſteal any deer, to rob a warren, or to ſteal fiſh from a river or pond, being armed or diſguiſed, or not; to hunt, wound, kill, or ſteal any deer in the King's foreſts or chaſes incloſed, or in any other

incloſed place where deer have been uſually kept; or by gift or promiſe of reward to procure any perſon to join them in ſuch unlawful act, is felony, without benefit of clergy. And every unauthoriſed perſon, his aiders, and abettors, who ſhall courſe, hunt, ſhoot at, or otherwiſe attempt to kill, wound, or deſtroy, any red or fallow deer in *any* foreſt, chaſe, or any *incloſed* ground, where deer are uſually kept, ſhall forfeit the ſum of twenty pounds; or for every deer actually killed, wounded, deſtroyed, taken in any toil or ſnare, or carried away, the ſum of thirty pounds, or double thoſe ſums, in caſe the offender be a keeper; and, upon a ſecond offence, ſhall be guilty of felony, and be tranſported for ſeven years: likewiſe, all perſons armed with offenſive weapons, that ſhall come into ſuch places, with an intent to commit any of the ſaid offences, and ſhall there unlawfully beat or wound any of the keepers, in the execution of their offices, or ſhall attempt to reſcue any perſon from their cuſtody, ſhall be tranſported for ſeven years. Tranſportation for ſeven years, is alſo inflicted on perſons ſtealing, or taking fiſh in any water within a park, paddock, garden, orchard, or yard; and on the receivers, aiders, and abettors: and the like puniſhment, or whipping, fine, or impriſonment, on ſuch as take or kill conies by night, in any open warren; and a forfeiture of five pounds to the ower of the fiſhery, is made payable by perſons taking, or deſtroying, (or *attempting* ſo to do,) any fiſh, in any river or other water within any incloſed ground, being private property. If ſwans be lawfully marked, it is felony to ſteal them, though at large in a public river, or in a private river or pond, though unmarked. Stealing hawks in diſobedience to the rules laid down, in 37 Edw. III. c. 19. is alſo felony. Stealing any valuable domeſtic animal, as horſes, and other beaſts of draught, and animals ſerving for food, as neat and other cattle, ſwine, poultry, and the like, and their produce while living, as milk or wool, is larceny: and, the fleſh of animals, (whether wild or tame, ſerving for food,) when killed; but, ſtealing animals, not ſerving for food, as dogs, cats, &c. and other creatures kept for pleaſure, (though the owner may maintain a civil action againſt thoſe who ſteal them,) does not amount to larceny. But ſtealing, or knowingly harbouring a ſtolen *dog*, or having in one's cuſtody the ſkin of a dog that has been ſtolen, is puniſhable with very high pecuniary penalties, or a long impriſonment; or whipping in their ſtead, may be inflicted by two juſtices of the peace. Stealing a ſhroud out of a grave, which is the property of thoſe who buried the deceaſed, is alſo larceny: but, ſtealing the

corps

corps itſelf, which has no owner, is not larceny, unleſs ſome of the grave cloaths be ſtolen with it.

The puniſhment for grand-larceny, that is, if the thing ſtolen be above the value of twelve-pence, is, by the Common Law, death; but, as this ſtandard was ſettled eight hundred years ago, when a fat ox could be bought for twelve-pence, the mercy of juries will lead them often to bring in larceny under the value of twelve-pence, when the thing ſtolen is in reality of much greater value. The puniſhment for petit-larceny, or larcenies, under twelve-pence, is, at Common Law, whipping, or may be extended to tranſportation for ſeven years. By the benefit of clergy, a perſon convicted of ſimple larceny to the value of thirteen pence, or thirteen hundred pounds, though guilty of a capital offence, may, for the firſt offence, have his life ſpared: and, in many caſes of ſimple larceny, the benefit of clergy is taken away by ſtatute, as from the principals, and acceſſories *before* and *after* the fact, in horſe-ſtealing: for theft, by great and notorious thieves in Northumberland, for taking woollen cloth from off the tenters. But in theſe caſes it is held, that it muſt be grand larceny, and perſons in whoſe cuſtody ſuch cloth is found, muſt prove their innocence, or they are puniſhable for the firſt offence, by forfeiture of treble the value: for the ſecond, by impriſonment alſo; and the third time it becomes a felony, ſubject to tranſportion for ſeven years. The benefit of clergy is alſo taken away for taking linens, fuſtians, calicoes, or cotton goods, from the place of manufacture; ſtealing ſheep, bulls, cows, ſteers, bullocks, heifers, calves, and lambs, or killing them, with intent to ſteal the whole, or any part of the carcaſe, or aiding or aſſiſting therein: for thefts in navigable rivers above the value of forty ſhillings, or being preſent, aiding, and aſſiſting thereat; for plundering veſſels in diſtreſs, or that have ſuffered ſhipwreck; for ſtealing letters ſent by the poſt; and alſo for ſtealing deer, fiſh, hares, and conies, under the peculiar circumſtances mentioned in the Black-Act.

Mixed or compound larceny, is of two ſorts; larceny from the *Houſe*, and larceny from the *Perſon*.

From larceny from the *Houſe*, except in the inſtance of ſtealing the ſtock or utenſils of the plate-glaſs manufactory, which is ſubject only to tranſportation for ſeven years, the benefit of clergy is generally taken away, and with the following particularities: firſt, in larcenies above the value of twelve-pence, committed. 1. In a church or chapel, with or without violence, or breaking the ſame. 2. In a booth or tent in a market

or fair, in the day or night, by violence or breaking the ſame; the owner, or ſome of his family, being therein. 3. By breaking into and robbing a dwelling-houſe, in the day time, any perſon being therein. 4. In a dwelling-houſe, by day or night, without breaking the ſame, any perſon being therein, and put in fear; which amounts to a robbery; and, in both theſe laſt caſes, 3 and 4, the acceſſories *before* the fact, is alſo excluded clergy. Secondly, in larcenies to the value of *five ſhillings* committed. 1. By breaking any dwelling houſe, or any out-houſe, ſhop, or warehouſe thereunto belonging, in the day-time, although no perſon be therein; which now extends to aiders, abettors, and acceſſory *before* the fact. 2. By privately ſtealing goods, wares, or merchandize in any ſhop, warehouſe, coach-houſe, or ſtable, by day or by night, though the ſame be not broken open, and though no perſon be therein; which likewiſe extends to ſuch as aſſiſt, hire, or command the offence to be committed. Laſtly, in larcenies to the value of *forty-ſhillings*, in a dwelling-houſe, or its warehouſes, although the ſame be not ſtolen, and whether any perſon be therein or no, (unleſs committed againſt their maſters, by apprentices, under the age of fifteen): this alſo extends to thoſe who aid or aſſiſt in the commiſſion of the crime.

Larceny from the *perſon* is of two kinds; *privately* ſtealing and *robbery*.

*Privately ſtealing* from a man's perſon, above the value of twelve-pence, as by picking his pocket, or the like, without his knowledge is felony, without benefit of clergy.

*Robbery*, is taking from another his money or goods violently, and by putting him in fear; and, is felony, without benefit of clergy; but a mere attempt to rob, is only tranſportation for ſeven years. Should the robber, however, take one's purſe, it is death, though he ſhould afterwards return it. It is equally robbery to take any thing from a man in his preſence, provided it be by menaces and violence, as to drive away his cattle before his face. The taking away a penny, equally with a pound, will make a man a robber, the ſum thereof is immaterial; but *privately* ſtealing from a man's perſon, any ſum, under the value of twelve-pence, and keeping it afterwards, by putting him in fear, is no robbery. Knocking a man down, and ſtripping him of his property while ſenſeleſs; begging arms with a drawn ſword; and forcibly extorting money under a pretence of ſale, are all robberies, if a man parts with his money or property, through a miſtruſt or apprehenſion of violence. But it is doubted

ed whether compelling a chapman to ſell his wares, and giving him the full value of them, be robbery or not.

2. The next offence againſt private property which the law puniſhes criminally, is *malicious miſchief*.

Maliciouſly to cut down or deſtroy the powdike in the Fens of Norfolk and Ely, is felony: and it is equally ſo to deſtroy ſea-banks, river-banks, public navigations and bridges: to burn any barn, or ſtack of corn or grain; or to impriſon or carry away any ſubject, in order to ranſom him, or make prey or ſpoil of his perſon or goods, in Northumberland, Cumberland, Weſtmoreland, and Durham, or being acceſſory *before* the fact, to ſuch carrying away or impriſonment; or, to give or take any money or contributions, there called *Black-Mail*, to ſecure ſuch goods from rapine, is felony, without benefit of clergy. Maliciouſly and unlawfully, in the night-time, to burn, or cauſe to be burned or deſtroyed, any ricks or ſtacks of corn, hay, or grain, barns, houſes, buildings, or kilns; or to kill any horſe, ſheep, or other cattle, is felony; but the offender may make his election to be tranſported for ſeven years: and to maim or hurt ſuch horſes, ſheep, or other cattle, is a treſpaſs, for which treble damages may be recovered. To burn on any waſte, between Candlemas and Midſummer, any grig, ling, heath, furze, goſs, or fern, ſubjects the offenders to whipping and confinement in the houſe of correction. Captains and mariners, belonging to ſhips, and deſtroying the ſame, to the prejudice of owners or inſurers, are guilty of felony, without benefit of clergy: and, making any hole in a ſhip in diſtreſs, or ſtealing her pumps, or aiding and abetting ſuch offence, or wilfully doing any thing, tending to the immediate loſs of ſuch ſhip, is felony, without benefit of clergy. Maliciouſly to ſet on fire any underwood, wood, or coppice, is ſingle felony. Wilfully and maliciouſly to tear, cut, ſpoil, burn, or deface, the garments or cloaths of any perſon, paſſing in the ſtreets or highways, with intent ſo to do, is felony, by the Black Act. To ſet fire to any houſe, barn, or out-houſe, or any kind of mill, or to any hovel, cock, mow, or ſtack of corn, ſtraw, hay or wood; or unlawfully and maliciouſly to break down the head of any fiſh-pond, whereby the fiſh ſhall be loſt or deſtroyed; or, in like manner to kill, maim, or wound any cattle; or cut down or deſtroy any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, ſhelter, or profit; or, to procure by gift, or promiſe of reward, any perſon to join therein, is felony, without benefit of clergy, and the hundred ſhall be chargeable for the damage,

unleſs the offender be convicted——Maliciouſly to cut down any river or ſea-bank, whereby lands may be overflowed or damaged; or to cut any hop-binds growing in a plantation of hops, or wilfully or maliciouſly to ſet on fire, or cauſe to be ſet on fire, any mine, pit, or depth of coal, is felony, without benefit of clergy. To uſe any violence, in order to deter any perſon from buying any corn or grain, to ſeize any carriage or horſe carrying grain or meal to or from any market or ſea-port, or to uſe any outrage with ſuch intent; or to ſcatter, take away, ſpoil, or damage, ſuch grain or meal, is puniſhable, for the firſt offence, with impriſonment and public whipping; for the ſecond offence, or for deſtroying any granary where corn is kept for exportation, or taking away or ſpoiling any grain or meal in ſuch granary, or in any ſhip, boat, or veſſel, intended for exportation, is felony, and tranſportation for ſeven years. To ſet fire to any graſs, furze, or fern, growing in any foreſt or chace, is ſubject to a penalty of five pounds. Wilfully to ſpoil or deſtroy any timber, or other trees, roots, ſhrubs, or plants, is, for the firſt and ſecond offence, ſubject to pecuniary penalties, and for the third, in the day-time, and even for the firſt, if at night, the offender ſhall be guilty of felony, and be tranſported for ſeven years. Stealing from gardens, or robbing fields of turneps, &c. is alſo tranſportation. Wilfully and maliciouſly to burn or deſtroy any engine, or other machine, belonging to any mine; or any fences for encloſures, purſuant to any act of parliament, is ſingle felony, and puniſhable with tranſportation for ſeven years in the offender, his adviſers, and procurers; and the like puniſhment is inflicted on ſuch as break into any houſe, &c. belonging to the plate-glaſs company, or any manufactory for hoſiery, with intent to ſteal, cut, or deſtroy any of their ſtock or utenſils, or ſhall wilfully and maliciouſly cut or deſtroy the ſame. Wilfully and maliciouſly to burn, or cauſe to be burnt, any wain or cart, laden with coals, or with any goods or merchandizes; or any heap of wood, prepared, cut, or felled, for making coals, billets or talwood, is puniſhable with forfeiture of treble damages to the parties grieved, and ten pounds to the King; and any juſtice may bind over to the peace and good behaviour, ſuch as threaten any one verbally to burn his houſe. Sending threatening letters to this purpoſe, has been ſhewn before to be felony, without benefit of clergy.

3. *Forgery* is the fraudulent making or alteration of a writing, to the prejudice of another man's right; which, at Common Law, is puniſhable with fine, impriſonment, and pillory; but various ſtatutes have made it felony, without benefit of clergy.

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A multitude of ſpecial acts inflict death on the forging, altering of, or uttering as true, when forged, any bank-bills, notes or other ſecurities; bills of credit iſſued from the Exchequer; South Sea bonds; lottery tickets or orders; army or navy debentures: Eaſt India bonds; writings, under ſeal of the London or Royal Exchange Aſſurance; of the hand of the receiver of the pre-fines, or of the accountant general and certain other officers of the court of chancery; a letter of attorney, or other power to receive or transfer ſtock or annuities; and on the perſonating a proprietor thereof, to receive or transfer ſuch annuities, ſtock, or dividends; alſo on the perſonating, or procuring to be perſonated, any ſeaman, or other perſon, entitled to wages, or naval emoluments, or any of his perſonal repreſentatives; or taking or procuring to be taken, any falſe oath, in order to obtain a probate, or letters of adminiſtration, in order to receive ſuch payments; and the forging or procuring to be forged, and likewiſe the uttering or publiſhing as true, of any counterfeited ſeaman's will or power; alſo on the counterfeiting of Mediterranean paſſes; forging or imitating of any ſtamps to defraud the public revenue, and the forging of any manuſcript licence or regiſter. Forging or counterfeiting any ſtamp or mark to denote the ſtandard of gold and ſilver plate, and certain other offences of the like tendency, are puniſhable with tranſportation for fourteen years. Certain frauds on the ſtamp duties, ſuch as uſing the ſame ſtamps more than once, is felony, ſubject to tranſportation for ſeven years: and the like puniſhment is inflicted on ſuch as counterfeit the common ſeal of the corporation for manufacturing plate glaſs, or knowingly demand money of the company, by virtue of any writing under ſuch counterfeit ſeal.

Forging, or procuring to be forged, or aſſiſting therein, or uttering as true, any forged deed, will, bond, writing obligatory, bill of exchange, promiſſory note, indorſement or aſſignment thereof, or any acquittance or receipt for money or goods, with intention to defraud any perſon or corporation, is felony, without benefit of clergy, even for the firſt offence: and to forge, or cauſe to be forged, or utter as true, a counterfeit acceptance of a bill of exchange, or the number or principal ſum of any accountable receipt for any note, bill, or any other ſecurity for money, or any warrant or order for the payment of money or the delivery of goods, is alſo felony, without benefit of clergy; and it is immaterial in forgeries, if they intend to defraud, whether they are in the name of a real or fictitious perſon.

But there is one determination of the judges reſpecting the forgery

forgery of a warrant or order for payment of money, or delivery of goods, proper to be mentioned, on a forged order of the following kind: "Let the bearer have ſix yards of ordinary ſtuff. "Geo. May." Nine of the judges were of opinion that ſuch an order was not within the meaning of the act; the words *warrant* or *order* importing, that the perſon giving ſuch warrant or order, hath, or at leaſt claims, an intereſt in the money or goods which are the ſubject matter of that warrant or order; and of courſe, that he has, or thinks he has, a power to transfer the property, which is not the caſe of an order upon a ſhop-keeper; unleſs the goods in ſuch ſhopkeeper's poſſeſſion, are the property of the perſon giving the order.

We have now gone through the whole circle of crimes and miſdemeſnors cogniſable by the laws of this country, and it appears that there is ſcarce a caſe poſſible to be conceived, wherein offenders are not, ſome way or other, puniſhable, in proportion to the heinouſneſs or aggravation of their offences.

## Chap. Third.

### OF SURETIES FOR THE PEACE, AND GOOD BEHAVIOUR.

THIS ſecurity conſiſts in obliging the ſuſpected perſon, or the offender, (for it is ſometimes part of the penalties inflicted on paſt miſdemeſnors) to be bound, with one or more ſureties, in an obligation to the King, taken in court, or by ſome magiſtrate, and entered on record, whereby the parties acknowledge themſelves indebted to the crown in the ſum required, with condition to be void, if the party ſhall appear in court on ſuch a day, and in the mean time ſhall *keep the peace*, either generally towards the King, or with regard to the perſon who ſues for the ſecurity; or if it be for good behaviour, then on condition that he ſhall demean and behave himſelf well, for the time therein limited. This recognizance, if taken by a juſtice of the peace, muſt be certified to the next ſeſſions; and if the conditions

tions of ſuch recognizance be broken by any breach of the peace, in the one caſe, or any miſbehaviour on the other, the ſum ſpecified in ſuch recognizance is forfeited, and the recognizance being ſent up to the Exchequer, the party and his ſureties are ſued for the ſums in which they are reſpectively bound.

The Lord Chancellor or Keeper, the Lord Treaſurer, all the Juſtices of the Court of King's Bench, and the Maſter of the Rolls, generally, and the other Judges in their own courts; the Sheriff, the Coroner, and all Juſtices of the Peace, may demand ſuch ſecurity at diſcretion; or it may be granted at the requeſt of any ſubject, upon due cauſe ſhewn; or if any Juſtice is unwilling to act in this matter, application is uſually made to the ſuperior courts, and recognizances are taken there. A peer or peereſs cannot indeed be bound over any where but in the court of King's Bench or Chancery: though a Juſtice of the Peace is authorized to require ſecurities of any other perſon (even of one another) not inſane, under the degree of nobility. Huſbands and wives may demand it againſt each other; but wives, and infants under age, cannot be bound themſelves, being incapable of engaging for any debt; ſuch muſt give ſecurity by their friends alone.

The following circumſtances will diſcharge a recognizance; the death of the King, to whom the obligation is made; the death of the principal party bound thereby, if not before forfeited; an order of the court, to which the recognizance is certified, if they think proper; and the requiſition of the perſon at whoſe requeſt it was granted, or in caſe he does not make his appearance to pray its continuance. So far, what has been ſaid is applicable to recognizances, either for the peace or good behaviour: but theſe ſecurities differ in other reſpects.

1. To keep the peace, any Juſtice may bind men over, who, in his preſence, quarrel or fight, or threaten to kill or beat another; or go about with unuſual weapons or attendance to the alarm of the people; or ſuch as he knows to be common barretors, ſuch as are brought before him by the conſtable for a breach of the peace, and ſuch as having been before bound, have broken it, and forfeited their recognizances. Alſo, where any perſon hath juſt cauſe to fear that another will burn his houſe, or do him a corporal injury, by killing, impriſoning, or beating him, or that he will procure others to do it; he may inſiſt on ſuch perſons being bound over to preſerve the peace, and every Juſtice of the Peace is obliged to grant it, if he demands it upon oath, alledging that he is in fear of his life or bodily harm, and that he does not require ſuch ſecurity out of malice or mere vexation.

tion. This is called *ſwearing the peace* againſt another; and if the party does not find ſuch ſureties as the juſtices ſhall require, he may be committed till he does.

Such recognizance, if ſpecial, becomes forfeited by an actual violence, aſſault, or menace, to the perſon of him who demands it: if it be general, it is forfeited by any unlawful action, that either tends to, or is, a breach of the peace: by a commiſſion of a variety of offences, or any private violence done to any man; but a bare treſpaſs upon the lands or goods of another, unleſs attended with a wilful breach of the peace, does not forfeit it.—Neither are mere reproachful words, calling a man a liar, or a knave, any breach of the peace, unleſs they amount to a challenge to fight.

2. Sureties for *good behaviour* include ſecurity for the peace, and ſomething more. Juſtices are empowered to bind down to good behaviour, to the King and people, all that are *not of good fame*, wherever found. Under which words, it is held that a man may be bound over for offences againſt good morals, as for haunting bawdy-houſes with women of bad fame, or for keeping ſuch women in his own houſe; for words tending to ſcandalize the government, or in abuſe of the officers of juſtice, eſpecially in the execution of their office; for being a night-walker, an eaves-dropper, for keeping ſuſpicious company, ſuch as are reported to be pilferers or robbers, for ſleeping in the day and waking at night, for being a common drunkard, whore-maſter, the putative father of a baſtard, a cheat, an idle vagabond, or for any other miſbehaviour that tends to his being thought a perſon not of good fame. An expreſſion, indeed, that gives great latitude to magiſtrates; but, if he commits a man for want of ſureties, he muſt expreſs the cauſe of ſuch commitment with tolerable certainty, and muſt take care that ſuch a cauſe be a good one.

Recognizances for good behaviour may be forfeited by the ſame means as for the ſecurity of the peace, or by committing any of thoſe acts of miſbehaviour which the recognizance was intended to prevent; but not by barely giving freſh cauſe of ſuſpicion of that which, perhaps, may never actually happen.

# Chap. Fourth.

## ON THE CRIMINAL COURTS.

HAVING treated of crimes and their puniſhments, it now remains to treat of the courts where ſuch crimes are cognizable. And here, as they have no dependence on one another, we will begin with the higheſt; the firſt of which is,

1. The high court of Parliament. An impeachment before the Lords, by the Commons of Great Britain, in Parliament, is a preſentment to the ſupreme court of criminal juriſdiction, by the grand inqueſt of the whole kingdom. A commoner cannot be impeached before the Lords for any capital offence, but only for high miſdemeſnors; but a peer may for any crime. Articles of impeachment are a kind of bills of indictment, framed by the Commons, and tried by the Lords; and no pardon, under the great ſeal ſhall be pleadable to an impeachment by the Commons of Great Britain in Parliament.

2. The court of the Lord High Steward is the next; and is a court inſtituted occaſionally, for the trial of Peers, indicted for treaſon or felony, or for miſpriſion of either. This High Steward muſt be a Lord of Parliament. Before ſuch trial, either in this court or the court of Parliament, the indictment muſt be found by a Grand Jury of Freeholders in the King's Bench, or at the aſſizes; and, in caſe of an appeal, a Peer ſhall be tried by Jury. A Peer may plead a pardon before the court of King's Bench, and the Judges have power to allow it, in order to prevent the appointment of a Lord High Steward, but he may not plead in that court *guilty*, or *not guilty*, leſt judgment of death, in conſequence, might be there paſſed againſt him. The indictment being found, the High Steward directs a precept to a ſerjeant at arms, to ſummon the Lords to attend the trial; and, upon all trials of Peers for treaſon or miſpriſion, all the Peers, who have a right to ſit and vote in Parliament, ſhall be ſummoned, at leaſt twenty days before ſuch trial, to appear and vote therein, and every Lord appearing, ſhall vote in the trial of ſuch Peer, firſt taking the oaths of allegiance and ſupremacy, and ſubſcribing the declaration againſt Popery.

The trial of a Peer, during the ſeſſion of Parliament, is not properly in the court of the Lord High Steward, though ſuch an officer

officer be appointed, but before the court laſt mentioned of our Lord the King in Parliament: the Lord High Steward ſitting in that court, rather as a chairman of the court than as a judge, and having a vote with the reſt of the Lords, in right of his peerage; but in the court of the Lord High Steward, which is held always in the receſs of Parliament, he is the ſole judge of matters of law, as the Peers are in matters of fact; and of courſe he has no right to vote upon the trial.

At trials in full Parliament, the Lords Spiritual, by a determination of the Houſe of Peers, have a right to ſtay and ſit in court, in capital caſes, till the court proceeds to the vote of guilty or not guilty; but in the court of the Lord High Steward, no Biſhop, as ſuch, ever was or could be ſummoned. Indeed they have no right to be tried themſelves in the court of the Lord High Steward; for the privilege of being thus tried depends upon nobility of blood, rather than a ſeat in the houſe. Even in trials for capital offences, in full Parliament, there is no inſtance of the biſhops ſitting; they withdraw voluntarily, but enter a proteſt, declaring their right to ſtay.

When it is ſaid that a nobleman muſt be tried by his Peers, it is underſtood at the ſuit of the King, upon an indictment of high treaſon, petit treaſon, felony, or miſpriſion thereof: but in caſe of a præmunire, riot, or the like, and generally for all other crimes, out of Parliament (unleſs otherwiſe ſpecially provided for by ſtatute, as it is in many inſtances) though it be at the ſuit of the King, he ſhall not be tried by his Peers, but by the freeholders of the county.

3. The court of King's Bench is a court of criminal cauſes as well as civil ones, and takes cognizance of crimes, from high treaſon down to a breach of the peace: there indictments from all inferior courts may be removed, and tried by a jury of the county, out of which the indictment is brought.

4. The high court of Admiralty, held before the Judge of the Admiralty, has alſo a criminal juriſdiction, and takes cognizance of all crimes and offences committed either upon the ſea, or on the coaſts, out of the reach of any Engliſh county; and of death and mayhem happening in great ſhips, being in the main ſtream of great rivers, below the bridges of the ſame rivers, which are then a fort of ports or havens, ſuch as are the ports of London and Glouceſter. It is enacted that theſe offences ſhall be tried by commiſſioners, nominated by the Lord Chancellor; namely, the Admiral or his Deputy, and three or four more; (among whom two common law judges are conſtantly appointed, who, in effect, try all the priſoners) the indictment being firſt found by a

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Grand Jury of twelve men, and afterwards tried by another Jury as at Common Law: and that the courſe of proceedings ſhall be according to the law of the land. Though the Judges try the priſoner, the Judge of the Admiralty always preſides, as does the Lord Mayor of London at the ſeſſions of *oyer* and *terminer* in that city.

Theſe four courts may be held at any place in the kingdom; and this juriſdiction extends over crimes that ariſe in any part of it: but the juriſdiction of the following is limited.

5, 6. The courts of *oyer* and *terminer*, and general gaol delivery, are held before commiſſioners appointed by the King, among whom are uſually two Judges of the courts of Weſtminſter, twice every year, in every county throughout the kingdom, except the four northern ones, where they are held but once a year, and except in London and Middleſex, where they are held eight times a year. The commiſſioners of aſſize and *Niſi prius*, by which the Judges ſit in the county, have been explained; and alſo the commiſſion of the peace, by which they likewiſe ſit. I ſhall only add here, that all Juſtices of the Peace, of any county wherein the aſſizes are held, are liable to be fined, if they do not attend at ſuch aſſize, in order to return recognizances, &c. and to aſſiſt the Judges in ſuch matters as lie within their knowledge and juriſdiction. The fourth commiſſion by which they ſit is that of *oyer* and *terminer*, to hear and determine all treaſons, felonies, and miſdemeſnors; ſo that by virtue of this commiſſion, they commonly proceed on indictments found at the aſſizes; they have, therefore, a fifth commiſſion, of gaol-delivery, which empowers them to try and deliver every priſoner, who ſhall be in gaol when the Judges arrive at the circuit-town, whenſoever, and by whomſoever indicted, or for whatever crime committed; ſo that the gaols are cleared twice a year. Sometimes, upon urgent occaſions, the King iſſues a ſpecial commiſſion, confined to offences that require immediate puniſhment, as was the commiſſion to try the rioters, in 1780, in Surry.

7. The court of general quarter-ſeſſions of the peace, muſt be held in every county, once in every quarter of a year, which is appointed to be in the firſt weeks after Michaelmas-day, Epiphany, the Tranſlation of St. Thomas, and the 7th of July. It is held between two or more Juſtices of the Peace, of which one muſt be of the *Quorum*. Though this court ſeldom, if ever, tries any greater offences than ſmall felonies, within the benefit of clergy, its juriſdiction extends to trying and determining all felonies and treſpaſſes whatever. Indeed the commiſſion provides, that in caſe any difficulty ariſes, they ſhall not proceed to judgment,

judgment, but in the preſence of one of the Juſtices of the courts of King's Bench or Common Pleas, or one of the Judges of Aſſize; and therefore capital felonies are uſually remitted for a more ſolemn trial at the aſſizes. Neither can they try any new-created offence, without an expreſs power given them by the ſtatute which creates it; but there are ſome miſdemeſnors that are cognizable in this court by ſtatute, ſuch as offences relating to the game, highways, alehouſes, baſtard children, ſettlement and proviſion for the poor, vagrants, ſervants wages, apprentices, and popiſh recuſants. Some of theſe are proceeded on by indictment, and ſome in a mere ſummary way, by motion and order thereupon, which order, unleſs guarded by particular ſtatutes, may be removed into the court of King's Bench, and be there either quaſhed or confirmed. The *Cuſtos Rotulorum*, who is always a Juſtice of the *Quorum* (and who is the principal *civil* officer in the county, as the Lord Lieutenant is the chief in military command) is nominated by the King's ſign-manual; and to him is committed the cuſtody of the records or rolls of the ſeſſions. He has the nomination of the Clerk of the Peace, and this office he is expreſsly forbid to ſell for money.

In moſt corporate towns there are quarter ſeſſions held before Juſtices of their own, within their reſpective diſtricts; with the ſame power as the quarter-ſeſſions of the county, except that appeals from their orders, reſpecting the removal of the poor, muſt be to the county ſeſſions. In both counties and towns corporate, there is ſometimes kept a ſpecial or petty ſeſſions, by a few Juſtices, for the convenience of the neighbourhood, between the times of the quarter-ſeſſions, ſuch as for licenſing alehouſes, paſſing pariſh accounts, and the like.

8. The Sheriff's Tourn is alſo a court. So is,

9. The Court-leet, which is, in fact, the King's Court, granted by charter to the Lords of Manors; but theſe courts are now fallen into diſrepute, and their buſineſs has gradually devolved upon the quarter ſeſſions.

10. The Coroner's Court is another, of which we have already treated.

11. The Court of the Clerk of the Market is the moſt inferior court of criminal juriſdiction in the kingdom. It is incident to every fair and every market, to puniſh miſdemeſnors therein, as a court of *pie-poudre* is to determine all civil diſputes. This court has cognizance chiefly of weights and meaſures, to try whether they are agreeable to the ſtandard; if not, the party uſing them is liable to be fined, and the weights and meaſures burnt.

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There are a few other criminal courts, which, from their confined juriſdiction, may be called private courts; but as they are now in diſuſe it is needleſs to mention them.

## Chap. Fifth.

### OF CONVICTIONS WITHOUT TRIAL, CALLED SUMMARY.

THE mode of conviction, in criminal courts, is either *ſummary* or *regular*.

*Summary conviction* is directed by ſeveral acts of Parliament, for inflicting certain penalties created by thoſe acts. Here there is no intervention of a Jury, but the party accuſed is acquitted or convicted in a ſummary way, by the ſuffrage of ſuch perſon or perſons only as the act has appointed for his Judge; an inſtitution contrived to prevent the frequent and troubleſome attendance of Juries, in very trifling cauſes. The proceſs of theſe ſummary convictions is extremely ſhort and ſpeedy. The magiſtrate ſummonſes the party accuſed to appear. If he does not appear, he proceeds to examine one or more witneſſes, as the ſtatute requires, upon oath, and then makes his conviction of the offender in writing; which done, he iſſues his warrant to apprehend him, if he is to be corporally puniſhed; or levies the penalty incurred, by diſtreſs and ſale of his goods. If the offender appears to the ſummons, he is heard in his own defence, and may bring witneſſes to ſupport that defence.

Summary convictions are branched out into three: 1. Thoſe before Commiſſioners, reſpecting offences againſt the laws of the exciſe and revenue; 2. Thoſe before Juſtices of the Peace, for diſorderly offences, ſuch as ſwearing, drunkenneſs, vagrancy, idleneſs, and the like; and 3. the mode of puniſhing contempts by attachments. I ſhall have occaſion only to dwell upon the laſt.

Such contempts as are thus puniſhed, are either thoſe which openly inſult or reſiſt the powers of the courts, or the perſon of the Judges there preſiding; or thoſe which, without any groſs inſolenc

inſolence or direct oppoſition, plainly tend to create diſregard to their authority. The chief offences of either kind that are uſually puniſhed by attachment, are the following: 1. The unjuſt, oppreſſive, or irregular acting of inferior judges and magiſtrates, in the execution of their offices. 2. Acts of oppreſſion, extortion, colluſive behaviour, or culpable neglect of duty, in ſheriffs, bailiffs, goalers, and other officers of the court. 3. Groſs inſtances of fraud and corruption, injuſtice to clients, or other diſhoneſt practices in attornies and ſolicitors. 4. Non-attendance when ſummoned, refuſing to be ſworn, or to give any verdict, or eating and drinking without leave of the court, eſpecially at the expence of the plaintiff or defendant, and the like, in jurymen. 5. Non-attendance when ſummoned, refuſing to be ſworn or examined, or prevaricating in their evidence, when ſworn, in witneſſes. 6. Diſobedience to any rule or order made in the proceedings of a cauſe; non-payment of coſts awarded by the court, or non-obſervance of awards duly made by arbitrators or umpires, after having entered into a rule for ſubmitting to ſuch determination, in parties to any ſuit or proceeding. Obedience to any rule of court, may be enforced againſt any member of parliament, by diſtreſs infinite. 7. Forcible delivery or reſcue of a defendant, and the like, or diſobedience to the King's great prerogative writs, *viz.* prohibition, *Habeas corpus*, &c. in any perſon, even in a peer. And, 8. Speaking or writing contemptuouſly of the court or judges, acting in their judicial capacity, by printing falſe accounts (or even true ones, without permiſſion) of cauſes then depending in judgment. In ſhort, any thing that demonſtrates a groſs want of reſpect to thoſe courts.

The proceſs of attachment is as follows: where the contempt is committed in the face of the court, the offender may, without any proof or examination, be inſtantly apprehended and impriſoned at the diſcretion of the judges: but in matters of which the court is not an eye-witneſs, if the judges, on *affidavit*, ſee reaſon to ſuſpect that a contempt has been committed, they either make a rule on the ſuſpected perſon, to ſhew cauſe why an attachment ſhould not iſſue againſt him; or, in very flagrant inſtances, the attachment is iſſued without ſuch a rule; as it does, if ſufficient cauſe be not ſhewn to diſcharge it. When the party is brought into court by this proceſs: he muſt either ſtand committed; or give bail to anſwer upon oath to ſuch interrogatories as ſhall be put to him reſpecting the offence. Theſe interrogatories are in the nature of a charge, and muſt be exhibited by the court within the firſt four days, and if any of the interrogatories

gatories ſhould be improper, the defendant may refuſe to anſwer them, and move the court to have them ſtruck out. If the party can clear himſelf upon oath, he is diſcharged; if not, he may be puniſhed by fine or impriſonment, on both, and ſometimes by corporal or infamous puniſhment; and if he perjures himſelf in his anſwers, he may be proſecuted for the perjury. This method of obliging the defendant here to anſwer upon oath to a criminal charge, is not agreeable to Common Law in any other inſtance; but being of high antiquity, by long and immemorial uſage, it is become the law of the Land.

## Chap. Sixth.

### OF THE REGULAR METHOD OF PROCEEDING IN CRIMINAL COURTS.

HAVING deſcribed the courts of criminal juriſdiction, and explained the mode of *ſummary* conviction, we come now to that which is *regular*, the proceedings in which are twelve: 1. Arreſt; 2. Commitment and bail; 3. Proſecution; 4. Proceſs; 5. Arraignment, &c. 6. Plea; 7. Trial, &c. 8. Benefit of clergy; 9. Judgment; 10. Reviſal of judgment; 11. Reprieve or pardon; and, 12. Execution.

I. And firſt, as to *arreſt*, to which, in criminal caſes, all perſons, without diſtinction, are liable: but none may be apprehended, unleſs charged with ſuch a crime, as will, at leaſt juſtify holding him to bail. Arreſts are made in four ways: 1. By warrant; 2. By an officer without warrant; 3. By a private perſon alſo with a warrant; and, 4. By hue and cry.

1. Warrants for criminal arreſts may, in extraordinary caſes, be iſſued out by the privy council, or the ſecretaries of ſtate, but generally they are granted by juſtices of the peace, on the oath of the party requiring ſuch warrants, ſetting forth, that he knows or ſuſpects the guilt of the perſon he wiſhes to apprehend, of the ſufficiency of which oath the magiſtrate is judge. This warrant ſhould be under the ſeal of the juſtice, ſhould ſet forth

the time and place of granting, the cauſe for which it is granted, and ſhould be directed to the conſtable, or other peace-officer, (or it may be to any private perſon by name) requiring him to bring the party generally before *any* juſtice of the peace for the county, or only before the juſtice who granted it; in which laſt caſe, the warrant is called a *ſpecial* warrant. A *general* warrant to apprehend all perſons ſuſpected, or guilty of any crime, without naming or deſcribing any one, is illegal, and will not juſtify the officer who acts under it; but if properly proved (though the magiſtrate, in granting ſuch warrant, ſhould exceed his power) will indemnify the officer. When a warrant is received by the officer, he is bound to execute it, ſo far as the juriſdiction of the magiſtrate and himſelf extends. A King's Bench warrant, iſſued by any of the juſtices of that court, extends over all the kingdom; but the warrant of a juſtice of the peace of one county, will not extend to another, unleſs backed by a magiſtrate of ſuch other county. And, any warrant for apprehending an Engliſh offender, who may have eſcaped to Scotland, and *vice verſâ*, may be indorſed and executed by the local magiſtrates, and the offender conveyed back to that part of the united kingdom, in which ſuch offence was committed.

2. Arreſts by officers without warrants. A juſtice may himſelf apprehend, or, by word only, cauſe to be apprended any perſon committing felony or a breach of the peace in his preſence. The ſheriff and coroner alſo, without a warrant, may apprehend any felon within the county. A conſtable may alſo, without warrant, take up any perſon breaking the peace in his preſence, and carry him before a juſtice, and in caſe of a felony committed, or ſuch a wound given as may occaſion felonious death, he may, on probable ſuſpicion, apprehend the offender, and for that purpoſe is juſtifiable in breaking open doors, even without a warrant, provided he has firſt aſked for admittance. Nay, he may kill the felon, if he cannot otherwiſe be taken: and if he, or either of his aſſiſtants, be killed in ſuch attempt, it is murder in all cencerned. Watchmen, ſuch as keep watch in all towns, from ſun-ſetting to ſun-riſing, or ſuch as are mere aſſiſtants to the conſtable, may by virtue of their office, arreſt all offenders, eſpecially night-walkers, and commit them to cuſtody till the morning.

3. Any private perſon preſent (more eſpecially a peace-officer) is bound by law, when any felony is committed, to apprehend the offender, on pain of fine and impriſonment, if he eſcapes by the negligence of the ſtanders-by: and to follow ſuch offender, he may break open any doors; he may even

juſtify

juſtify killing him, if he cannot be taken alive; and ſhould any be killed in endeavouring to apprehend him, it is murder. A private perſon may alſo arreſt a felon or other perſon on ſuſpicion: but he muſt not break open a door to do this; and if either party kill the other in the attempt, it is manſlaughter. Any private perſon may apprehend beggars and vagrants.

4. Hue and cry is the old Common Law method of purſuing felons, and ſuch as have dangerouſly wounded another. It is enacted that every county ſhall be ſo well kept, that immediately upon robberies and felonies committed, freſh ſuit ſhall be made from town to town, and from county to county, and that hue and cry ſhall be raiſed upon the felons, from town to town, until they be taken and delivered to the ſheriff; and that ſuch hue and cry may more effectually be made, the hundred is bound to anſwer for all robberies therein committed, unleſs they take the felon. Hence the action againſt the hundred to recover loſs by robbery. No hundred, however, ſhall be anſwerable for any robbery on a perſon *travelling* on the Lord's Day, except in going to church; but the inhabitants ſhall make hue and cry notwithſtanding, on pain of forfeiting to the King as much money as the party was robbed of. Nor ſhall any perſon recover againſt the hundred, more than the value of two hundred pounds, unleſs the perſon robbed, ſhall at the time of the robbery, be together in company, and be in number two at leaſt, to atteſt the truth of his or their being ſo robbed. And by the yearly land-tax acts, no receiver-general, or any of his agents employed for carrying of money on account of the ſaid tax, ſhall maintain an action againſt the hundred, unleſs the perſons carrying ſuch money be together in company, and be in number three at the leaſt. Alſo a robbery done in the night, ſhall not charge the hundred; but yet if it be in the day-time or in ſo much light, as that to ſee a man's face, ſo as to know him, though it be before the ſun-riſing, or after the ſun-ſetting, the hundred ſhall anſwer for it. But there are ſeveral notices to be given, by the party robbed, to make the hundred liable. No hue and cry is ſufficient, unleſs made with both horſemen and footmen. And, the conſtable and like officer, refuſing or neglecting to make hue and cry, forfeits five pounds, and the whole vill, or diſtrict, is liable to be amerced, if any felony be committed therein, and the felon eſcapes. Hue and cry may be raiſed either by precept of a juſtice of the peace, by a peace-officer, or by any private perſon knowing of a felony. The party raiſing it muſt acquaint the conſtable of the vill with all the circumſtances which he knows of the felony, and with the perſon of the felon, on which the conſtable

is to ſearch his own town and raiſe all the neighbouring villages and make purſuit with horſe and foot, and in the proſecution of ſuch hue and cry, the conſtable and his attendants have the ſame powers, protection, and indemnification, as if acting under the warrant of a juſtice of the peace. But, if a man wantonly and maliciouſly raiſes a hue and cry, without cauſe, he ſhall be ſeverely puniſhed, as a diſturber of the public peace.

To encourage the apprehending of felons, certain rewards and advantages are, by ſtatute, beſtowed on ſuch as bring them to juſtice. Such as apprehend a highwayman and proſecute to conviction, ſhall receive a reward of forty pounds from the public; to be paid to them (or, if killed in the endeavour to take him, their executors) by the ſheriff of the county, beſides the horſe, furniture, arms, money, and other goods taken upon the perſon of ſuch robber, with a reſervation of the right of any perſon from whom the ſame may have been ſtolen: and alſo ten pounds to be paid by the hundred indemnified by ſuch taking. Such as apprehend and convict any offender againſt theſe ſtatutes reſpecting the coinage, ſhall (in caſe the offence be treaſon or felony) receive a reward of forty pounds; or ten pounds, if it only amount to counterfeiting the copper coin. Any perſon apprehending and proſecuting to conviction a felon guilty of burglary, houſe-breaking, horſe-ſtealing, or private larciny to the value of five ſhillings from any ſhop, warehouſe, coach-houſe or ſtable, ſhall receive a certificate exempting him from all pariſh and ward-offices; which certificate he may aſſign over, and the aſſignee ſhall have the benefit of it. And, any perſon ſo apprehending and proſecuting a burglar, or felonious houſe-breaker (or, if killed in the attempt, his executors) ſhall be entitled to a reward of forty pounds. Perſons diſcovering, apprehending and proſecuting to conviction any perſon taking reward for helping others to their ſtolen goods, ſhall be entitled to forty pounds. Perſons apprehending and proſecuting to conviction ſuch as ſteal or kill with an intent to ſteal, any ſheep or other cattle, ſpecified in the latter of the ſaid acts, ſhall, for every ſuch conviction, receive a reward of ten pounds: and, perſons diſcovering, apprehending, and convicting felons and others, being found at large during the term for which they are ordered to be tranſported, ſhall receive a reward of twenty pounds.

II. The next part of criminal proceſs is *commitment and bail*. When an offender is apprehended and brought before a juſtice of the peace, that juſtice is bound immediately to examine into the charge againſt him; acquit him, if innocent, and make him find bail or commit him to priſon, if guilty, or if any ſuſpicion ariſe

againſt him. For this purpoſe, he is to take in writing the examination of ſuch priſoner, and the information of thoſe who bring him.

By the *Habeas corpus* act, to refuſe bail to any perſon bailable is an offence in any magiſtrate, at the Common Law, againſt the liberty of the ſubject; and, leſt the intention of the law ſhould be fruſtrated by magiſtrates requiring more bail than is neceſſary, it is declared, that exceſſive bail ought not to be required; but if magiſtrates take inſufficient bail, and the criminal doth not appear at the time he is bound by ſuch a bail to appear, they are liable to be fined. The perſon who is to take the bail may however, examine them on their oaths concerning their ſufficiency. Admitting bail, alſo, where it ought not, is puniſhable by the judge of aſſize by fine, or puniſhable as a negligent eſcape, at Common Law; and, if any officer bail any not bailable, he ſhall have three years impriſonment, and make fine at the King's pleaſure. Perſons acknowledging or procuring to be acknowledged any bail, in the name of any other not privy to the ſame, or guilty of felony, without benefit of clergy; or, if any one ſhall perſonate another before thoſe who have authority to take bail, ſo as to make him liable to the payment of any ſum of money in that ſuit or action, he ſhall be guilty of felony (but within clergy). Bail may be taken in open court, or, in ſome caſes, by the ſheriff, coroner, or other magiſtrate. But let us ſee what offences are *not* liable, we ſhall then learn what *are*. No juſtice of peace is allowed to take bail for a charge of treaſon, murder, or even manſlaughter, if the priſoner be clearly the killer and not barely ſuſpected; or if any indictment be found againſt him. Perſons committed for felony, and breaking out of priſon, cannot be bailed by juſtices: nor any of the following, *viz.* perſons outlawed; ſuch as have abjured the realm; approvers, of whom we ſhall ſpeak hereafter; perſons taken in the fact of felony; ſuch as are charged with arſon; and excommunicated perſons. The following are bailable or not, at the diſcretion of the juſtices; thieves openly known; perſons charged with other felonies, or manifeſt and enormous offences, not having a good character; and acceſſories to felony, that labour under a bad reputation. But the following *muſt* be bailed if proper ſecurity be offered, *viz.* perſons of good character charged with a bare ſuſpicion of manſlaughter, or other inferior homicide, or ſuch perſons charged with petit larciny or any ſuch felony, not before-mentioned; or ſuch perſons acceſſory to felony. The court of King's Bench, however, (or any judge thereof, in time of vacation) may bail

for any crime, according to the circumſtance of the caſe, even for treaſon or murder; except ſuch perſons as are committed by either houſe of parliament during the ſitting of the ſeſſions, or ſuch as are committed for contempts by any of the King's ſuperior courts of juſtice. In ſhort, where the offence is not bailable, the priſoner is to be committed to goal, for trial, by the *mittimus* of the juſtice, that is, a warrant under his hand and ſeal, ſpecifying the cauſe of his commitment. But, during this confinement, it being only for ſafe cuſtody, the priſoner ſhould be neither loaded with needleſs fetters, or ſubjected to any other hardſhip than the goaler, in his diſcretion, ſhall think neceſſary, in order to keep him ſafely.

III. The next ſtep to the conviction and puniſhment of offenders is their *proſecution*, of which there are four modes; *viz.* 1. Preſentment; 2. Indictment; 3. Information; and, 4. Appeal. The firſt two are upon a previous finding of the fact by a grand jury; the other without ſuch finding.

1. A Preſentment, is the cognizance taken by the grand jury of any offence, from their own knowledge and obſervation; without any bill of indictment laid before them; ſuch as the preſentment of a nuſance, a libel, and the like; upon which the officer of the court frames an indictment, before the party can be called upon to anſwer it. There are alſo preſentments which are inquiſitions of office, or the act of a jury ſummoned by the proper officer to enquire of matters relative to the crown, from evidence laid before them, ſome of which are in themſelves convictions, Of this kind are *felo de ſe*; flight of perſons accuſed of felony; deodands, &c. There are alſo preſentments of petty offences, in the ſheriff's tourn or court leet, whereon the preſident officer may ſet a fine. There are other inquiſitions that are not in themſelves convictions, but which may be afterwards inquired into; particularly that of the coroner on the death of a man; in which caſe the offender ſo preſented, may diſpute the truth of it.

2. Indictments are written accuſations of one or more perſons, of a crime or miſdemeſnor, at the ſuit of the King, preferred to, and preſented upon oath by, a grand jury. Grand juries conſiſt of reſpectable freeholders (generally the men of moſt conſequence in the county) ſummoned by the ſheriff, every ſeſſion of the peace, and every aſſize; ſome out of every hundred. The number ſummoned is twenty-four, and as many of theſe as attend, not leſs than twelve, nor more than twenty-three, (that twelve may be a majority) are ſworn to inquire for the body of the county, preſent and do and execute all thoſe things

things which, on the part of our Lord the King, ſhall then and there be commanded them. This grand jury is previouſly inſtructed in the articles of its enquiry, by a charge from the judge who preſides on the bench. They then withdraw, and ſit and receive indictments preferred to them in the name of the King, but at the ſuit of any private proſecutor. As the finding of an indictment, or allowing it to be valid, is only in the nature of an accuſation to be afterwards tried; this jury is only to examine into the evidence in behalf of the proſecution: that is, they are to enquire upon their oaths, whether there be ſufficient cauſe to call upon the party accuſed to anſwer the accuſation or not.

If the grand jury, on hearing the evidence in behalf of the proſecution, think it a groundleſs charge, they write on the back of the bill. "not found," or, "not a true bill," and the party is immediately diſcharged. But a freſh bill may afterwards be preferred to a ſubſequent grand jury. If the jury are ſatisfied with the truth of the charge, they indorſe upon it, "a true bill." The indictment is then ſaid to be found, is publicly delivered into court, and the party ſtands for trial. Note. To find a bill, twelve of the jury muſt aſſent.

3. Informations, which are ſpecies of proſecution at the ſuit of the King, without any preſentment, or previous finding of the bill by a grand jury, are of two ſorts: that partly at the ſuit of the King, and partly at the ſuit of a ſubject; and that wholly in the name of the King. The former is uſually brought upon penal ſtatutes, which inflict a penalty on conviction of the offenders; one part to the uſe of the King, the other to that of the informer. On which I ſhall only obſerve, that no proſecutions upon any penal ſtatute, the ſuit and benefit whereof are limited in part to the King, and in part to the proſecutor, can be brought by any common informer after one year is expired ſince the commiſſion of the offence; nor on behalf of the crown after a lapſe of two years longer; nor, where the forfeiture is originally given to the King, can ſuch proſecution be tried, after the expiration of two years from the commiſſion of the offence.

Informations in the name of the King only, are of two ſorts; thoſe properly his own ſuits, filed *ex officio* by the attorney-general, and thoſe in which the King is nominal proſecutor, which laſt are, at the relation of ſome private perſon or common informer, filed by the maſter of the Crown Office, who is the ſtanding officer for the public. Proſecutions that are filed by the attorney-general in virtue of his office, are for ſuch enor-

mous miſdemeſnors as tend to diſturb the King's government, or affront him in the regular diſcharge of his duty; thoſe filed by the maſter of the Crown-Office on complaint of a ſubject, are any groſs miſdemeſnors, riots, batteries, libels, and other flagrant immoralities. Informations thus filed muſt be tried by a petit jury of the county, where the offence ariſes, and if the offender be found guilty, the court of King's bench muſt be reſorted to, to puniſh him. But, it muſt be obſerved, that theſe informations are confined to mere miſdemeſnors only. And, to prevent vexatious informations brought by malicious proſecutors, it is enacted, That the clerk of the crown ſhall not file any information, without expreſs direction from the court of King's Bench; and that every proſecutor, permitted to promote ſuch information, ſhall give ſecurity by a recognizance of twenty pounds to proſecute the ſame with effect, and to pay coſts to the defendant, in caſe he be acquitted thereon, unleſs the judge who tries the information, ſhall certify there was reaſonable cauſe for filing it; and, at all events, to pay coſts, unleſs the information ſhall be tried within a year after iſſue joined: but informations filed by the attorney-general, are not liable to the reſtraints of this act.

4. An Appeal is a mode of proſecution ſtill in force, but in little uſe, from the great nicety required in conducting it: it implies an accuſation by one private perſon againſt another, for ſome felony or mayhem, demanding puniſhment of the offender for the injury committed. An appeal of felony may be brought for larciny, rape, and arſon committed againſt one's ſelf, or for murder or manſlaughter committed againſt a relation; but ſuch relation muſt be a huſband, and the appeal brought by the wife for his death; or an anceſtor, and the appeal for his death brought by the heir male, and confined to the four neareſt degrees of blood. Such power of appeal being given to the wife for the loſs of her huſband; if ſhe marries again, before or pending her appeal, it is loſt; or if ſhe marries after judgment, ſhe cannot demand execution. The heir that brings an appeal muſt be the next heir by the courſe of Common Law, at the time his anceſtor was killed, and ſuch appeal is ſubject to three rules. 1. If the anceſtor killed, leaves an innocent wife, ſhe only ſhall have the power of appeal, and not the heir. 2. If there be no wife, and the heir be accuſed of the murder, the perſon, who next to him would have been heir-male, ſhall bring the appeal. 3. If the wife kills her huſband, the heir may bring the appeal: and, all appeals of death, muſt be ſued within a year and a day after the death of the party.

Theſe

Theſe appeals may be brought, previous to an indictment, and if the defendant be acquitted, he cannot afterwards be indicted for the ſame offence. If the defendant be acquitted, the perſon appealing ſhall ſuffer one year's impriſonment, and pay a fine to the King, beſides reſtitution of damages to the party for the impriſonment and infamy which he has ſuſtained: and if the appellor be incapable to make reſtitution, his abettors ſhall do it for him, and alſo be liable to impriſonment. But this is, if the appeal ſhall appear to the court to have been malicious. This diſcouragement has occaſioned the diſuſe of appeals.

If the appellee or defendant be guilty, he ſhall ſuffer the ſame judgment, as if he had been convicted on indictment; with this difference, that an indictment being at the ſuit of the King, he may either pardon or remit the execution, but on an appeal, which is at the ſuit of a private perſon, for an atonement of the injury, the King can no more pardon it, than he can remit the damages recovered on an action of aſſault. The puniſhment, however, of the criminal may be remitted and diſcharged by the concurrence of all parties intereſted; and as the King, by his pardon may fruſtrate an indictment, ſo may an appellant, by his releaſe, diſcharge an appeal.

IV. Indictment, however, being the general *mode of proceſs*, I ſhall confine my obſervations to this, pointing out any variation that may ariſe from the method of proſecuting by either information or appeal.

After the indictment found, the offender, ſuppoſed to be in cuſtody before ſuch finding of the indictment, is to be immediately put upon his trial; but if, in capital caſes, he hath eſcaped or ſecretes himſelf; or, in ſmaller offences, having been bound over, doth not appear at the aſſizes or ſeſſions (as an indictment may be found againſt him in his abſence) proceſs muſt iſſue to bring him into court; for the indictment cannot be tried unleſs he perſonally attends.

If upon a writ iſſued, ſummoning his attendance, he does not appear, a warrant is made out to apprehend him, commanding the ſheriff to bring him up at the next aſſizes. If he abſconds, he may, if it is thought proper, be outlawed. But, an outlawry, in treaſon or felony, amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty. But ſuch outlawry may be reverſed by a writ of error, and the proceedings therein are ſo exceedingly nice (as indeed they ſhould be) that if any one ſingle, minute point be omitted or miſconducted, the whole out-

lawry may be ſet aſide, on which the party accuſed is admitted to plead and defend himſelf againſt the indictment.

V. The offender being brought into court, he is to be imdiately *arraigned*; which is calling him to the bar to anſwer the charge againſt him. He is to be called there by name, and brought without irons or any ſhackles, unleſs there is danger of his eſcaping. When at the bar, he is called upon, by name, to hold up his hand, by which he owns himſelf to be the perſon ſo called. The indictment then is read to him, after which he is aſked, whether he is guilty or not guilty of the crime whereof he ſtands indicted. Where there is an acceſſory to the crime, he cannot be tried ſo long as the principal remains liable to be tried hereafter; but, if the principal be once convicted, and before attainder (that is, before he receives judgment of death or outlawry) he is delivered by pardon, the benefit of clergy or otherwiſe; or if the principal ſtands mute, or challenges peremptorily above the legal number of jurors, ſo as never to be convicted at all; in any of theſe caſes, in which no ſubſequent trial can be had of the principal, the acceſſory may be proceeded againſt, as if the principal felon had been attainted. And upon the trial of the acceſſory, as well after as before the conviction of the principal, the acceſſory is at liberty (if he can) to controvert the guilt of his ſuppoſed principal, and to prove him innocent of the charge, as well in point of fact as in law.

Should a criminal, on being arraigned, confeſs the fact, the court hath nothing to do but to award judgment; but it is very tender on this head, and generally adviſes the priſoner to retract his confeſſion, and plead to the indictment. If a criminal arraigned for treaſon or felony, without benefit of clergy, confeſſes the fact, and accuſes others his accomplices of the ſame crimes, he is called an Approver, and if the perſon ſo accuſed, is convicted upon his trial, ſuch approver ſhall be pardoned; if not, he ſhall receive judgment to be hanged on his own confeſſion of the indictment. But it is in the diſcretion of the court to permit this approvement or not, and it has been long in diſuſe on account of the many falſe and malicious accuſations of deſperate villains. Eſpecially as it has alſo been cuſtomary for the juſtices of the peace, before whom any perſons are brought for felony, to admit ſome one of their accomplices, to become a witneſs (called King's evidence) againſt his fellows, upon an aſſurance which the judges of goal-delivery have generally countenanced, that if ſuch accomplice makes a full and complete diſcovery of that and all other felonies to which he is examined by ſuch juſtice, and afterwards gives his evidence without prevarication

cation or deceit, he ſhall not himſelf be proſecuted, for that or any other previous offence of the ſame degree.

If a criminal ſtands mute, and will not plead to the indictment, it amounts to a confeſſion of the crime. If he is really dumb, the judges of the court (who are to be counſel for the priſoner, and to ſee that he hath law and juſtice) may proceed to trial, as if he had pleaded not guilty; but, it is doubted whether ſentence of death can be paſſed on ſuch a perſon, he not being able to ſay any thing in arreſt of judgment. A priſoner's making no anſwer at all, when arraigned; anſwering foreign to the purpoſe; or having anſwered not guilty, refuſing to put himſelf upon his country, is conſtrued as ſtanding mute; and it has been held to be ſo, when a priſoner has cut out his own tongue.

VI. Upon the pleading of the priſoner, let us next ſee what plea he can make, or what matter he can alledge in his defence. Now there are five ſpecies of pleas, which the law hath thus denominated. 1. A plea to the juriſdiction; 2. A demurrer; 3. A plea in abatement; 4. A ſpecial plea in bar; or, 5. The general iſſue of not guilty.

1. A plea to the juriſdiction is an exception to the authority of the court to try the offence.

2. A demurrer to the indictment, is incident to civil caſes as well as criminal ones, and is where the priſoner does not deny the charge, but inſiſts that the fact, as ſtated, is no felony, treaſon, or whatever the crime is alledged to be: and even when in demurrer the point of law is adjudged againſt the priſoner, no advantage is taken of his confeſſing the fact, but he is notwithſtanding, allowed to plead not guilty.

3. A Plea in abatement, is principally for a wrong name or a falſe addition given to the priſoner in the indictment, which if found by a jury, the indictment ſhall be null: but this is of little advantage to the priſoner, as a new indictment may be framed according to what the priſoner avers his true name or addition to be, which he is obliged to ſet forth.

4. A Special plea in bar, is a much more ſubſtantial plea. This goes to the merits of the indictment, and gives a reaſon why the priſoner ought not to be tried for the offence alledged. Theſe are of four kinds; a former acquittal, a former conviction, a former attainder, or a pardon.

A *former acquittal.* A perſon once fairly acquitted, upon any proſecution, before a court competent to try the offence, may plead ſuch acquittal, as a bar to any freſh indictment for the ſame identical crime.

A *former conviction* for the ſame identical crime, though no judgment was given, being ſuſpended by the benefit of clergy or other cauſes, is a good plea in bar of an indictment. But,

*A former attainder*, is a good plea, in bar for the ſame or any other felony; for a priſoner, by attainder, being dead in law, his blood being already corrupted, and all his property forfeited, it would be abſurd to endeavour to attaint him a ſecond time: unleſs the former attainder, had been reverſed for error, by act of parliament, or pardon. But where the attainder was upon indictment, ſuch attainder is no bar to an appeal as the King may pardon any ſentence upon indictment. An attainder for felony is no bar to an indictment for treaſon, the forfeiture and manner of death for the two crimes being different; nor is it any bar, where a man is principal in a felony to which there are acceſſories to be tried, as ſuch acceſſories cannot be tried till the principal is convicted. In ſhort, a former attainder is not ſufficient to bar an indictment, but in caſes where a ſecond trial would be ſuperfluous.

But a *pardon* is always a good plea in bar. Pardon pleaded before trial, or *before* ſentence is paſſed, is much more advantageous than pleading it *after* ſentence: as it prevents that corruption of blood which the ſentence inflicts; for ſuch corruption cannot be reſtored but by act of parliament: but, of pardons we ſhall ſay more hereafter.

Let me obſerve however here, with reſpect to pleas in bar, that though in civil actions, a man, if he fails in one plea, cannot make uſe of another, of courſe, it behoves him to ſtudy well his firſt plea; yet in capital proſecutions, as well upon appeal as indictment, if the priſoner's firſt plea fails, he may plead the general iſſue, not guilty. On which plea of

5. General iſſue, the criminal can only be condemned. Here he is allowed to make the beſt defence he can, either by juſtifying the fact, or controverting the evidence againſt him. On pleading not guilty, he is aſked how he will be tried; to which he is to anſwer, if a commoner, "by God and my country;" that is, his jury; if a peer, "by God and my peers;" and ſhould he refuſe to make this anſwer, he is deemed to ſtand mute, and, of courſe, is convicted.

VII. The trial of peers in the court of Parliament, or the court of the Lord High Steward, has been mentioned already: it remains only to obſerve, that it differs little from trial by jury, except that the peers need not all agree in their verdict; and no ſpecial verdict can be given, the lords of Parliament or the Lord High Steward (if trial be in his court) being judges

ſufficiently

ſufficiently competent of the law in theſe caſes; but the majority, conſiſting in the leaſt of twelve, will bind the reſt.

But the trial by jury is the grand bulwark of an Engliſhman's liberties, ſecured to him by *Magna Charta*. By which it is enacted, That no free man ſhall be taken, impriſoned, baniſhed, or, in any other way, deſtroyed, but by the legal judgment of his peers, or by the law of the land.

When a priſoner hath pleaded not guilty, and put himſelf for trial upon his country, that is, his jury; the court, by the clerk ſays, "God ſend thee a good deliverance."

Forty eight jurymen are here ſummoned, and returned by the ſheriff from the neighbouring freeholders in the county where the fact was committed. Theſe are to try all felons that may be called on their trial at that ſeſſion. In caſes of high-treaſon, whereby corruption of blood may enſue (except treaſon in counterfeiting the King's coin or ſeals) or miſpriſion of ſuch treaſon, it is enacted, That the priſoner ſhall have a copy of the indictment, five days before the trial, and a copy of the panel of jurors, two days before his trial; and he ſhall have the ſame compulſive proceſs to bring his witneſſes *for* him, as was uſual to compel their appearance againſt him. And, all perſons indicted for high-treaſon, or miſpriſion thereof, ſhall have a liſt of all the witneſſes to be produced, and of the jurors impanelled, with their profeſſions and places of abode, delivered to him ten days before the trial, and in the preſence of two witneſſes, the better to enable him to make his challenges and his defence, except in treaſons reſpecting the King's coin and ſeals.

The trial being called, the jurors are to be ſworn as they appear, to the number of twelve, unleſs challenged by the priſoner or on the part of the King; and here, as in civil caſes, challenges or exceptions may be made to the whole array, or to the ſeparate polls, and for the ſame reaſons. Alſo, where an alien is indicted, the jury ſhould be half foreigners, if ſo many can be found in the place (except in trials for treaſon, aliens being improper judges of allegiance, and in trials of gipſies). In capital caſes, the priſoner is allowed an arbitrary or capricious challenge, called *peremptory*, to thirty-five jury-men, without ſhewing any cauſe at all, that he may not be diſconcerted by not having a good opinion of his jury: but this peremptory challenging is denied to the King, who ſhall challenge no jurors without aſſigning a cauſe certain, to be tried and approved by the court. But the King's counſel need not aſſign the cauſe of challenge, till all the panel is gone through, unleſs there cannot be a full jury without the perſons ſo challenged. If a priſoner

ſoner challenges more than thirty-five peremptorily, and will not retract his challenge, he is deemed to ſtand mute, and his conviction, of courſe, follows. In trials of felony, a priſoner is not allowed more than twenty peremptory challenges, if he challenges more, ſuch challenge is ſet aſide, and ſuch juror is ſworn. If, on account of theſe challenges, or a want of a ſufficient number of jurymen, the number of twelve cannot be had, the court may order a new panel to be inſtantly returned. The twelve jurymen are ſeparately ſworn "well and truly to try "and true deliverance make, between our ſovereign Lord the "King, and the priſoner at the bar, and a true verdict give, "according to their evidence."

The jury being ſworn, if it be a cauſe of any conſequence, the King's counſel uſually open the indictment, examine the witneſſes, and enforce the proſecution by argument. But the priſoner in any capital crime, is allowed no counſel on his trial, the judge being appointed to be his counſel; and, becauſe the evidence to convict a priſoner, ſhould be ſo manifeſt as not to be contradicted. Counſel is, however, allowed him, where a point of law ſhall ariſe, and be thought proper to be debated. The judges indulge him likewiſe ſo far, as to ſuffer counſel to examine the evidence even in matters of fact; but, perſons indicted for ſuch high treaſon as works a corruption of blood, or miſpriſion thereof (except treaſon in counterfeiting the King's coin or ſeals) may make their full defence by counſel, not exceeding two, to be named by the priſoner, and aſſigned by the court or judge, and the ſame indulgence is allowed to parliamentary impeachments for high-treaſon.

In all caſes of high-treaſon, petit-treaſon, and miſpriſion of treaſon, *two* lawful witneſſes are required to convict a priſoner, unleſs he ſhall willingly or without violence confeſs the ſame; and except in treaſons for counterfeiting the King's coin, ſeals, and ſignatures, or for importing counterfeit, foreign money current in this kingdom, and impairing, counterfeiting, or injuring any current coin. If the priſoner confeſſes the fact, ſuch confeſſion muſt be in *open court*: but, it is held on theſe words, that a confeſſion, when out of court, before a magiſtrate or perſon authorized to take it, and proved by two witneſſes, is ſufficient: both witneſſes muſt alſo be to the ſame overt act of treaſon, or one to one overt act, and the other to another overt act of the ſame ſpecies of treaſon, and not of diſtinct heads or kinds; and no evidence ſhall be admitted to prove any overt act not expreſsly laid in the indictment. But in almoſt every accuſation, one poſitive witneſs is ſufficient. One witneſs is not allowed

allowed to convict a man indeed for perjury, becauſe there is then only one oath againſt another; and in treaſon, two witneſſes are required, that a man may not fall a ſacrifice to fictitious conſpiracies; but as in other crimes, the very privacy of their nature often excludes the poſſibility of having more witneſſes than one, it would be wrong to let ſuch eſcape unpuniſhed.

Mere ſimilitude of hand-writing, in two papers ſhewn to a jury, is no evidence that both were written by the ſame perſon, but evidence, well acquainted with the party's hand, that the paper in queſtion is believed to have been written by him, the jury is to judge of.

The mother of a baſtard-child, concealing its death, muſt prove, by one witneſs, that the child was born dead, or ſuch concealment ſhall be evidence of her having murdered it.

The law holding it better that ten guilty perſons ſhould eſcape rather than that one innocent man ſhould ſuffer, all preſumptive evidence is very cautiouſly admitted, and the following rules are uſually obſerved. 1. Never to convict a man for ſtealing the property of a perſon unknown, merely becauſe he will not account how he came by it, unleſs an actual felony be proved of ſuch property; and, 2. Never to convict a perſon of murder or manſlaughter, unleſs the dead body be found. Formerly witneſſes for the priſoner, in capital caſes, were not allowed to be examined at all, or at leaſt not be examined upon oath; but now, in all caſes of treaſon and felony, all witneſſes *for* the priſoner, are admitted to be examined upon oath, in like manner as the witneſſes *againſt* him.

When the evidence againſt and for the priſoner is gone thro', and he has ſaid what he thought proper in his defence, the jury are to conſider of it, as in civil cauſes, and deliver in their verdict: neither can they be diſcharged till they have. Here, indeed, in a criminal caſe, no jury can give a privy verdict, it muſt be open; and alſo general, either guilty or not guilty or ſpecial, ſetting forth all the circumſtances of the caſe, and praying the judgment of the courts on the facts ſtated: this is where they doubt the matter of law, though, if they think proper to hazard a breach of their oaths, they have a right to determine the matter themſelves, and if their verdict be notoriouſly wrong, they may be puniſhed, and their verdict ſet aſide, by attaint, at the ſuit of the King, but not at the ſuit of the priſoner. In many inſtances where, contrary to evidence, the jury have found the priſoner guilty, their verdict hath been mercifully ſet aſide, and a new trial granted by the court of King's Bench: but

but there never was an inſtance of a new trial being granted, where the priſoner was *acquitted* on the firſt.

Should the jury find the priſoner not guilty, he is for ever diſcharged of the accuſation (but the civil law diſcharges him only from the ſame accuſer, not from the ſame accuſation) except he be appealed of felony, within a year and a day of the completion of the felony being committed; and upon ſuch diſcharge, or for want of proſecution, he ſhall be immediately ſet at liberty, without payment of any fee to the gaoler. If the priſoner be found guilty he is ſaid to be convicted; he may alſo be convicted on his own confeſſion, or by ſtanding mute.

On conviction, in general, for any felony, the proſecutor is allowed the reaſonable expences of the proſecution, out of the county-ſtock, if he petitions the judge for that purpoſe: and poor perſons, bound over to give evidence, (except in Middleſex) are entitled to be paid their charges, as well without conviction as with it. On a conviction of larceny, the proſecutor, as a reward for the proſecution, ſhall have his goods reſtored to him, or the value of them, out of the offender's goods, if he has any, by a writ to be granted by the juſtices; and though ſuch goods may have been ſold in open market, the buyer is obliged to give them up, even to his own loſs; and it is now uſual for the court, upon the conviction of the felon, to order, (without any writ) immediate reſtitution to the proſecutors, of ſuch goods as are brought into court; or elſe the proſecutor, without ſuch writ of reſtitution, may peaceably retake his goods wherever he can find them, unleſs they have been fairly purchaſed; or, if the felon be convicted, and eſcape with life, either through benefit of clergy or pardon, the party robbed may bring his action of trover againſt him for his goods, and recover a ſatisfaction with damages; but he cannot bring ſuch action before proſecution, leſt it ſhould encourage compounding of felony; nor can the party retake them, if it be done with a deſign to ſmother or compound the larceny. Such compoſition being a heinous offence.

Perſons convicted of a miſdemeſnor, as of a battery, impriſonment, or any other offence, immediately affecting an individual, are ſometimes permitted by the court to talk with the proſecutor, before judgment is paſſed; to try if they can make the matter up, and if the proſecutor declares himſelf ſatisfied, the puniſhment inflicted is but trivial; this, though a dangerous practice, is done to reimburſe the proſecutor his expences, and make him ſome private compenſation, without the trouble of a civil action.

After

After conviction, judgment, that is ſentence, follows; unleſs ſtayed or arreſted by benefit of clergy, or ſome other intervening circumſtance.

VIII. Benefit of clergy was an inſtitution to exempt the clergy from criminal proceſs before a ſecular judge, which grew to the exemption of all who could read, till, under Hen. VII. a diſtinction was made between laymen and clerks in orders, ſubjecting the former to be burnt with a hot iron in the left thumb, and denying them this privilege a ſecond time. Lords of parliament and peers of the realm, may have the benefit of their peerage, equivalent to that of clergy, for the firſt offence, without being burnt in the hand, for all offences clergyable to commoners; and alſo for the crimes of houſe-breaking, highway-robbery, horſe-ſtealing, and robbing of churches. But it being afterwards conſidered, that the puniſhment of death was too ſevere for ſimple felony, the benefit of clergy is allowed to all thoſe who are entitled to aſk it, without requiring them to read; but, that where any perſon is convicted of any theft, or larceny, and burnt in the hand for the ſame, he ſhall alſo, at the diſcretion of the judge, be committed to the houſe of correction, or public workhouſe, to be there kept to hard labour, for any time, not leſs than ſix months, and not exceeding two years; with a power of inflicting a double confinement, in caſe of the offender's eſcaping from the firſt. And if any perſons ſhall be convicted of any larceny, either grand or petit, or any felonious ſtealing or taking of money, or goods and chattles, either from the perſon or houſe of any other, or in any other manner, and who, by the law, ſhall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court, in their diſcretion, inſtead of ſuch burning in the hand or whipping, may direct ſuch offenders to be tranſported for ſeven years; and, if they return, or are ſeen at large in this kingdom, within that time, it ſhall be felony without benefit of clergy. And, all offenders, liable to tranſportation, may, inſtead thereof, at the diſcretion of the court, if males, be employed in hard labour, for the benefit of the navigation of the river Thames; or, whether males or females, be confined to hard labour, in the houſe of correction, for any term, not leſs than three years, nor more than that for which they are liable to be tranſported, in any caſe not exceeding ten years; with a power of ſubſequent mitigation, in caſe of their good behaviour; but in caſe of eſcapes their confinement is doubled, for the firſt offence, and it is felony, without benefit of clergy, for the ſecond.

We

We may hence ſee to what perſons the benefit of clergy is at this day allowed. It is allowed to all clergymen, without branding, and of courſe without tranſportation (which is a puniſhment ſubſtituted inſtead of branding or burning) who are immediately to be diſcharged, and this as often as they offend: alſo all lords of parliament and peers of the realm, having place and voice in parliament (which is held to extend to peereſſes) ſhall be diſcharged without either burning in the hand or impriſonment as real clerks convict, but this only for the firſt offence. And all others, not in orders, male or female, ſhall, for the firſt offence, be diſcharged of the puniſhment of clergyable offences, on being burnt in the hand, and ſuffering a diſcretionary impriſonment; or, in caſe of larceny, on being tranſported for ſeven years, if the court ſhall think fit.

By the Marine law, however, the benefit of clergy is not allowable in any caſe whatever; and therefore, where offences are committed within the admiralty-juriſdiction, which would be clergyable if committed on land, the conſtant rule is to acquit and diſcharge the priſoner.

Beſides the corporal puniſhment inflicted on ſuch as are allowed the benefit of clergy, the offender forfeits all his goods to the King. After conviction, till he receives the judgment of the law, by burning, or the like, or is pardoned by the King, he is conſidered as a felon, and is ſubject to all the diſabilities and other incidents of felony. After burning or pardon, he is diſcharged for ever of that and all other felonies before committed of a clergyable nature, but not of felonies from which ſuch privilege is excluded. By burning or pardon he is reſtored to all capacities and credits, and the poſſeſſion of his lands, as if he had never been convicted. And as to peers and clergymen, they have theſe privileges and advantages, without any burning, which others are entitled to after it.

IX. We come next to judgment and its conſequences. When the jury have delivered in their verdict, guilty, in capital offences, the priſoner is aſked what he has to offer in arreſt of judgment. If the defendant be found guilty of a miſdemeſnor, (the trial for which, if he has once appeared, may be carried on in his abſence) a warrant is iſſued to bring him into court to receive judgment, and, if he abſconds, he may be outlawed; but, whenever he appears in perſon, he may, either on a capital or inferior conviction, now, as well as at his arraignment, offer any exceptions to the indictment, in arreſt or ſtay of judgment; as for want of ſufficient certainty in ſetting forth either the perſon, the time, the place, or the offence; and if the objections be valid,

lid, the whole proceedings ſhall be ſet aſide; but the offender may be indicted again: And indeed ſo nice and tender is the law, in favour of the priſoner, that more knaves eſcape, by exceptions in indictments than by their innocence.

The King's pardon, as was mentioned before, may here be pleaded in arreſt of judgment, and with the ſame advantages as upon arraignment, *viz.* ſaving the corruption of blood, which, if not pleaded till after the ſentence, nothing but an act of parliament can reſtore.

If nothing be offered in arreſt or ſtay of judgment, ſentence is now to be paſſed; which is different, according to different crimes. When ſentence of death is paſt, its immediate conſequence is attainder, the effect of which is forfeiture and corruption of blood.

1. There is forfeiture of real eſtates, and forfeiture of perſonals. By attainder in high-treaſon, a man forfeits to the King all his real and perſonal property, whether in poſſeſſion or claim, and this forfeiture takes place at the time the treaſon was committed, ſo as to render void all intermediate ſales and incumbrances, but not thoſe before the fact; of courſe the wife's jointure is not thus forfeited, but her dower expreſsly is, and yet the huſband ſhall be tenant by the courteſy of the wife's lands, if the wife be attainted of treaſon, that not being prohibited by the ſtatute. If a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, no forfeiture takes place; for, as he never received ſentence, he was never attainted. But ſhould the Chief Juſtice of the King's Bench, in perſon, as Supreme Coroner, upon the view of the body killed in open rebellion, record it, and return the record into his own court, both lands and goods ſhall be forfeited.

In certain treaſons relating to coin, it is provided by ſome of the modern ſtatutes which create the offence, that it ſhall work no forfeiture of lands, ſave only for the life of the offender; and by all, that it ſhall not deprive the wife of her dower.

In petit-treaſon and felony, the offender alſo forfeits to the crown all his chattel intereſts abſolutely, and the profits of all freehold eſtates, during life, and after his death, all his lands and tenements in fee-ſimple, (but not thoſe in tail) for a year and a day, in which time the King may commit what waſte he pleaſes. This year, day, and liberty of waſte, are now uſually compounded for. After this year and a day, in gavel-kind tenure, it deſcends to the heir, but in other tenures it eſcheats to the lord. Theſe forfeitures for felony ariſe alſo only on attainder, and, therefore, a *felo de ſe*, who is never attainted, forfeits

feits no lands of inheritance or freehold. They likewiſe here, as well as in treaſon, take place at the time when the offence was committed; ſo as to render void all intermediate incumbrances and conveyances.

In miſpriſion of treaſon, and ſtriking in Weſtminſter-hall, or drawing a weapon on a Judge, there ſitting on the bench, in office, the profits of the offender's goods are forfeited during his life. Even for flight, on an accuſation of treaſon, felony, or petit larceny, if the jury find the flight, whether the party be found guilty or acquitted, he forfeits his lands and chattels: but this flight the jury ſeldom finds, it being thought too great a puniſhment for the offence.

Between the forfeiture of lands, and of goods and chattels, there is this difference: lands are not forfeited before attainder, whereas goods and chattels are forfeited by conviction; for, in many caſes, where goods are forfeited, there is no attainder. In outlawries for treaſon or felony, lands are forfeited only by the judgment, whereas goods and chattels are forfeited on the proclamation of outlawry. The forfeiture of lands takes place back at the time the fact was committed; whereas, that of goods and chattels takes place only at the time of conviction; a traitor, therefore, may, *bona fide*, ſell any of his chattels, real or perſonal, for the ſupport of himſelf and family, any time before his conviction; but, if they be colluſively parted with, merely to defraud the King, the law will recover them; for as the offender, if acquitted, might recover them himſelf, ſo may the King, if the offender is convicted.

Between the commiſſion of the crime and the conviction of the criminal, the ſheriff or other officer may ſeize the offender's goods upon indictment, ſo far as to inventory and appraiſe them, but ſhall leave them in the offender's cuſtody, that the party accuſed and his family, may have ſufficient of them for their livelihood and maintenance; for no ſheriff, or other perſon, ſhall take or ſeize the goods of any perſon arreſted or impriſoned for ſuſpicion of felony, before he be convicted or attainted, or before the goods be otherwiſe forfeited, on pain of double value to the party aggrieved.

2. Another conſequence of attainder is corruption of blood, both in aſcent and deſcent; what this corruption of blood is, and how it operates, has been fully ſhewn. But it muſt be obſerved, that in tenures, indiſputably Saxon, or gavel-kind, tho' land is forfeited to the King, yet no corruption of blood, no impediment of deſcent enſues; and, on judgment of mere felony no eſcheat accrues to the lord. In certain treaſons reſpecting the

the papal ſupremacy, and the coin, and in many of the new-created felonies, the particular acts reſpecting them, enact, That corruption of blood ſhall be ſaved.

X. Let us next ſee how judgment, with its conſequences, *viz.* attainder, forfeiture, and corruption of blood, may be ſet aſide. Now, this may be brought about two ways: 1. By reverſing the judgment; and, 2. By reprieve, or pardon.

By reverſing the judgment, this may be done by a writ of error, which lies from all inferior criminal courts to the court of King's Bench, and may be brought for palpable errors in the judgment or other parts of the record, ſuch as where a man is found guilty of perjury, and receives the ſentence of felony; but leſs errors are ſufficient to reverſe a judgment, ſuch as, any irregularity, omiſſion, or want of form, in the proceſs of outlawry or proclamations: but the more effectual method of a reverſing judgment is by act of parliament, where it can be procured.

Judgment, however, may be reverſed or falſified without a writ of error or an act of parliament, for matters foreign to, or not apparent upon, the face of the record; as, in both civil or criminal caſes, where the whole record be not certified, or not truly certified by the inferior court. If a judgment be given, that is ſentence paſſed, by a perſon not properly commiſſioned, it may be falſified, or made void, by ſhewing the ſpecial matter, without writ of error. As I obſerved once before, if a commiſſion iſſues to twelve perſons, to try indictments, of which *A* or *B* ſhall be one, and any other of the twelve proceed to trial, without *A* or *B*, all the proceedings in ſuch trial, &c. would be void; and ſhould a man, by ſuch trial, be condemned and executed, it would be little ſhort of murder in the judge that tried and ſentenced him.

Reverſing an outlawry puts the party exactly in the ſame ſituation as he would have been in, had he appeared upon the warrant iſſued to bring him into court; for all other proceedings, except the proceſs of outlawry for his non-appearance, remain good and effectual as before. But when judgment is reverſed, all former proceedings are ſet aſide, and the party ſtands as if he had never been accuſed; and though, upon his attainder, the crown may have granted away his eſtates, yet the owner may enter upon the grantee or poſſeſſor, with as little ceremony as he might enter upon a diſſeiſor, or one who puts him out of poſſeſſion, but he ſtill remains liable to another proſecution for the ſame crime; for, the paſt proſecution being erroneous, he never was in jeopardy thereby.

IX. R

XI. Reprieve or pardon are the other modes of avoiding execution.

1. Reprieve is the withdrawing of a ſentence for a certain ſpace of time, a ſuſpenſion only of execution. It is in the breaſt of a judge to reprieve a convict, either before or after ſentence; provided he is either not ſatisfied with the verdict, thinks the evidence inſufficient, or is doubtful whether the offence be felony without benefit of clergy; or to give time to apply to the King for pardon, where favourable circumſtances appear on behalf of the criminal. Judges uſually reprieve in theſe caſes, though their ſeſſion be finiſhed and their commiſſion expired.

Women, capitally convicted, if they appear to be quick with child, are generally reprieved for the ſake of the infant, till after their delivery: but when they plead themſelves pregnant, a jury of twelve diſcreet women are directed by the judge to examine into the fact; and if they bring in their verdict, quick with child, that is, report that the child is alive within her, execution is delayed from ſeſſion to ſeſſion, till ſhe is delivered, or proved by the courſe of nature, not to have been with child at all.

If the offender, after ſentence, becomes inſane, it is a regular cauſe of reprieve, as the law knows not, but, if in his reaſon, he might have offered ſome reaſons to ſtay execution. It is an invariable rule, therefore, if any length of time intervenes between the judgment and the award of execution, to aſk the priſoner what he hath to alledge why execution ſhould not be awarded againſt him, and if he appears to be inſane, the judge may, and ought to reprieve him. Should the party plead, in bar of execution, that he is not the ſame perſon that was attainted, or againſt whom ſentence was paſſed; a jury is immediately impanelled to examine into the identity of his perſon, and no time is allowed the priſoner to make his defence or produce witneſſes, that he is not the perſon attainted; and in this jury no peremptory challenges are allowed him.

2. But, the laſt and ſureſt reſort is the King's pardon. Now the King has power to pardon all offences merely againſt the crown or the public, except a *præmunire* incurred by committing any man to priſon out of the realm. In appeals, which are at the ſuit of the party injured, the King cannot indeed pardon but the proſecutor may releaſe. Neither can he pardon a nuſance, while it continues, though he may afterwards remit the fine; nor an offence againſt a penal ſtatute, after information lodged; for the informer, thereby hath acquired a property in his part of the penalty. And no pardon under the great ſeal of England ſhall be *pleadable* to an impeachment by the Common

Commons in parliament; as ſuch pardons would defeat the effect of impeachment; but after the impeachment has been heard and determined, the King is at liberty to pardon the offender.

Pardons muſt be iſſued under the great ſeal. Any ſuppreſſion of truth, or ſuggeſtion of falſehood in a charter of pardon, will deſtroy it: for the King is ſuppoſed, in ſuch caſe, to be miſinformed. It is a general rule, however, that pardons ſhall be conſtrued moſt beneficially for the ſubject, and moſt ſtrongly againſt the King.

Pardons may alſo be conditional; for example, on being confined to hard labour for a certain time, or on being tranſported for life or a term of years. Pardons, by act of parliament, are more beneficial than thoſe under the great ſeal, as a man is not bound to plead ſuch pardon, the court muſt take notice of it *ex officio*; nor can a man loſe the benefit of ſuch a pardon by negligence as he may of the King's pardon; for he muſt plead the King's at a proper time, or it loſes its effect. The judges have a diſcretionary power to bind a criminal, pleading the King's pardon, to his good behaviour, with two ſureties, for any term not exceeding ſeven years.

Though the King's pardon, granted after attainder, will not reſtore or purify blood corrupted by ſuch attainder; yet it acquits the criminal of all corporal penalties and forfeitures annexed to the crime for which he obtains the pardon, and gives him a new credit and capacity: it enables him to tranſmit new inheritable blood; and ſhould he, after the pardon, have a ſon, that ſon may be heir to his father, which he could not have been, had he been born before the pardon.

XII. Execution is the completion of human puniſhments, and in all caſes muſt be performed by the ſheriff or his deputy, who acts by the authority of the judge ſigning the calendar or liſt of all the priſoners' names, with the reſpective judgments in the margin; for example, in capital felonies, it is written oppoſite the felon's name, "Let him be hanged by the neck;" which is the only warrant the ſheriff has. But for the execution of a peer, tried by the court of parliament, a writ or warrant is iſſued by the King; if tried in the court of the Lord High Steward, the warrant is iſſued by the judge of that court.

Upon the receipt of the warrant, the ſheriff is to execute the criminal, within a convenient time; which, in the country, is left at large; but in London there is more ſolemnity, both in the warrant of execution and the time of performing it; for the recorder, after reporting to the King, in perſon, the caſe of the ſeveral priſoners, and receiving his royal pleaſure, that the law muſt

muſt take its courſe, iſſues his warrant to the ſheriff, appointing the day of execution, and the place aſſigned; and, if the priſoner be tried at the bar of the court of King's Bench, or brought there by *Habeas Corpus*, a rule is made for his execution, ſpecifying the time and place, or leaving it to the ſheriff; and throughout the kingdom, it is enacted, that in the caſe of a murder, the Judge ſhall, in his ſentence, direct the execution to be performed, on the next day but one after the ſentence, except that day be Sunday, and then on the Monday following.

I have had occaſion to obſerve before, that it would be felony in a ſheriff to alter the manner of execution, by ſubſtituting one kind of death for another. The King cannot even change the puniſhment. And it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly put to death, but revives, the ſheriff is bound to hang him again; for, if a falſe tenderneſs were to be indulged in ſuch caſes, there might be no end to the colluſion.

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